SUPREME COURT, U. S.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

Statement Under Rule 15, Subdivision (b)

This action was commenced on the 22d day of April, 1946. The names of the original parties are James E. Markham, Alien Property Custodian, plaintiff, and Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, and Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., defendants.

Statement Under Rule 15, Subdivision (b)

There has been no change of parties to the action except
4 that Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, was substituted as plaintiff in place and stead of James E. Markham, Alien Property Custodian, the original plaintiff.

The complaint in the action was filed on the 22d day of April, 1946. The answer of defendant Henry M. Propper, as receiver, etc. was filed on the 13th day of May, 1946. The answer of the defendant Deems Taylor, as President, etc., was filed on the 7th day of October, 1946.

No defendant was arrested, or bail taken; no property was attached or arrested on account of the proceedings
5 hereunder.

No trial was had herein. The final judgment appealed from was entered as the result of a decision by Coxe, U. S. D. J., rendered the 21st day of January, 1947, upon (1) a motion by the defendant Henry M. Propper, as receiver, as aforesaid, for judgment on the pleadings under Subdivision "c" of Rule 12 of the Rules of Civil Procedure, or for summary judgment under Rule 56 of the Rules of Civil Procedure, dismissing count "two" of the complaint herein; and (2), a cross-motion by the plaintiff for judgment on the pleadings, or for summary judgment in favor of the plaintiff and against said defendant receiver on
6 count "two" of the complaint.

No question was referred to a master or referee; and no result of the proceedings, and no report or reports on such reference exists.

The decision of Coxe, U. S. D. J., which was the basis of the final judgment appealed from, is dated the 21st day of January, 1947; the final judgment appealed from is dated the 10th day of February, 1947 and entered on the 11th day of February, 1947. This appeal was taken on February 28, 1947.

Summons

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number: Civ. 35-581

JAMES E. MARKHAM,
Alien Property Custodian,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an Unincorporated Association of more than seven members,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendants.

To the above-named Defendant:

You are hereby summoned and required to serve upon John F. X. McGohey United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Courthouse, Foley Square, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to

do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL
Clerk of the Court

(Seal of the U. S. District Court)

Dated April 22, 1946

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

Complaint

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COUNT 1.

1. Jurisdiction is founded on Section 24(1) of the Judicial Code, as amended, 28 U. S. C. 41(1), and on Section 17 of the Trading with the Enemy Act, 50 U. S. C., Appendix, 17.

2. The defendant, American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP, is an unincorporated association, consisting of more than seven members, with principal place of business in the city, county and state of New York, and is constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and allotting and distributing such royalties. At the time of the commencement of this action, Deems Taylor was and still is president of ASCAP.

3. At all times hereinafter mentioned, La Societe des auteurs, Compositeurs et Editeurs de Musique, hereinafter referred to as SACEM, was and still is an unincorporated association existing under the laws of the Republic of France, with principal place of business at Paris, France, and is constituted for the purpose of granting licenses and

collecting royalties for the public performance of the musi-
16 cal works of its members and of allotting and distributing such royalties among its members.

4. On or about June 19, 1933 ASCAP and SACEM entered into an agreement in writing wherein and whereby SACEM granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic public performance for profit of certain musical works, the performing rights of which then were, or which during the term of the agreement
17 might be, vested in or controlled by SACEM, and ASCAP agreed to require of and collect from its licensees payment for such public performance, and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement, to account to SACEM for collections made for the preceding calendar year and to remit to SACEM the proceeds of such collections after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "A" hereto.

5. Said agreement by its terms became effective Janu-
18 ary 1, 1933 and at all times since, material to this action, has remained in full force and effect. At all times SACEM has duly performed its obligations under the terms of said agreement.

6. Commencing January 1, 1933 and at all times thereafter, pursuant to said agreement, the defendant ASCAP has licensed the performance of musical works, vested in or controlled by SACEM, has received and collected license

fees for such performances, and has deducted and retained its expenses, commissions, and payment, but has failed and refused to deliver to SACEM the net sum of $349,755.35 collected during the period January 1, 1937 to September 4, 1943.

7. By Vesting Order 2097, executed September 4, 1943, filed with the Division of the Federal Register December 4, 1943, and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all rights and interest of SACEM in and to the contract of June 19, 1933, and all right, title, interest, and claim in and to the said sums so collected and withheld by ASCAP as set out herein, all in compliance with law.

8. On September 11, 1943 plaintiff made written demand on the defendant ASCAP for delivery of the said license fees collected and withheld by it. In response to said demand, ASCAP has delivered or is delivering to plaintiff the net license fees collected by it subsequent to September 4, 1943 and has also delivered to the plaintiff a portion of the fees so collected and withheld by it prior to September 4, 1943 in the amount of $135,976.91, but at all times has neglected and refused to deliver to the plaintiff the remainder of said fees so collected by it for SACEM prior to September 4, 1943 in the amount of $243,778.44, all of which is due, owing, and unpaid.

COUNT 2.

1. Paragraph 1 of Count 1 is incorporated by reference.

2. Paragraph 2 of Count 1 is incorporated by reference.

22 3. The defendant, Henry M. Propper, is receiver of the property and assets of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as AKM, in the state of New York, having been appointed as such receiver by the Supreme Court of New York in and for the County of New York in an action entitled Franz Sobotka v. Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commenced June 9, 1941 and bearing file number 12719/1941. As such receiver the said Henry M. Propper claims to have title to the moneys which are the subject matter of this count.

23 4. At all times material to this action up to and including December 31, 1938, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (State-approved Society of Authors, Composers and Music Publishers), hereinafter referred to as AKM, was a registered cooperative society with limited liability, organized and existing under the laws of the Republic of Austria and was constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and of allotting and distributing such royalties among its members.

24 5. On or about January 1, 1933 the defendant ASCAP and AKM entered into an agreement in writing wherein and whereby AKM granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic public performance for profit of certain musical works, the performing rights of which then were or which during the term of the agreement might be, vested in or controlled by AKM, and ASCAP agreed to require of and collect from its licensees payment for such

public performance; and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement, to account to AKM for collections made for the preceding calendar year and to remit to AKM the proceeds of such collections after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "B" hereto.

6. Said agreement by its terms became effective January 1, 1933 and remained in full force and effect at all times subsequent to that date until December 31, 1938. At all times, AKM duly performed its obligations under the terms of said agreement.

7. At all times between January 1, 1933 and December 31, 1938 ASCAP, pursuant to the terms of said agreement, licensed in the United States and its territories the performance of musical works vested in or controlled by AKM, received and collected license fees for such performances and deducted and retained its expenses, commissions, and payment for such licensing and collection, but failed and neglected to remit to AKM the net sum of $62,809.85 collected by ASCAP during said period.

8. On June 9, 1941, one Franz Sobotka, a national of Austria, filed in the Supreme Court of New York in and for the County of New York, his petition alleging that the said AKM had been liquidated and had assets within the State of New York and praying for the appointment of a receiver of such property pursuant to Sec. 977(b) of the Civil Practice Act of New York. On June 12, 1941, pursuant to said petition, the defendant, Henry M. Propper,

was appointed temporary receiver of the property and
28 assets of AKM within the State of New York, and on September 29, 1941, upon default of AKM, final judgment was entered against it in said action and Propper's appointment as receiver was made permanent. By reason of his appointment as receiver of the property and assets within the State of New York of AKM, the defendant Propper claims to have acquired title to the license fees of AKM collected and withheld by ASCAP which are the subject of this count. On July 9, 1941 the defendant, Propper, served on ASCAP written notice of his appointment as temporary receiver together with a demand for delivery
29 of the funds of AKM held by ASCAP and on July 29, 1941, the said Propper, as temporary receiver, commenced an action against ASCAP to recover the funds so held by it, which action is still pending in the courts of the State of New York but has not proceeded to trial on its merits.

9. By Vesting Order No. 2097 executed September 4, 1943, filed with the Division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all right, title, interest, and claim in and to the said license fees so collected and with-
30 held by ASCAP as set out herein, all in compliance with law.

10. On September 11, 1943 the plaintiff made written demand on the defendant ASCAP for delivery of the said fees so collected and withheld by it, but ASCAP at all times has refused and neglected to deliver said fees or any part thereof to the plaintiff.

11. The plaintiff, by his Vesting Order No. 2097, has acquired full and complete title to the license fees collected by ASCAP for AKM which are the subject matter of this count, and the defendant, Henry M. Propper, receiver, has no right, title, or interest therein superior to the rights of this plaintiff. 31

12. At the time of the appointment of the defendant Propper as receiver of the property and assets of AKM within the State of New York, and at all times since, material to this action, Executive Order 8389 of April 10, 1940 (5 Fed. Reg. 1400, 1677, 2279, 2586, 2667, 4062, 6 Fed. Reg. 1285, 1443, 1622, 2187, 2897, 3715, 6348, 6785), has been and is in full force and effect and has been and is applicable to AKM and to the property which is the subject of this count. The purported and attempted acquisition of title by the defendant Propper was a transaction involving property in which a foreign national had an interest within the purview of Executive Order No. 8389 and was in violation of and was prohibited by the terms of said Executive Order No. 8389 and was and is null and void and of no force and effect. The defendant Propper, by reason of his appointment as receiver, acquired no title to nor interest in the property which is the subject matter of this count superior to the rights acquired by this plaintiff pursuant to his Vesting Order No. 2097. 32 33

COUNT 3.

1. Paragraph 1 of Count 1 is incorporated by reference.

2. Paragraph 2 of Count 1 is incorporated by reference.

34 3. At all times hereinafter mentioned, material to this action, Staatlich Genehmigte Gesellschaft Zur Verwertung Musikalischer Urheberrechte (State-approved Society for the Exploitation of Musical Copyrights), hereinafter referred to as STAGMA, was a public governmental corporation of the German government, with principal place of business at Berlin, Germany, and was constituted for the purpose of granting licenses and collecting royalties for the public performance of the musical works of its members and of allotting and distributing such royalties among its members.

35 4. On or about January 1, 1933, ASCAP and Genossenschaft Zur Verwertung Musikalischer Auffuhrungsrechte (Society for the Exploitation of Music Performance Rights), hereinafter referred to as GEMA, and Gennossenschaft Deutscher Tonsetzer (Society of German Composers), hereinafter referred to as GDT, both of Berlin, Germany, entered into an agreement in writing wherein and whereby GEMA and GDT granted to ASCAP the exclusive right to license in the United States, Alaska, Puerto Rico, Philippine Islands, Virgin Islands, Hawaii, and its colonies and possessions, the non-dramatic performance for profit of certain musical works, the performing rights
36 of which then were, or during the term of the agreement might be, vested in or controlled by GEMA or GDT, and ASCAP agreed to require of and collect from its licensees payment for such public performance, and, on or before the 30th day of September succeeding the close of each calendar year during the term of said agreement to account to GEMA and GDT for collections made for the preceding calendar year and to remit the proceeds of such collection

to GEMA and GDT, after deduction of its expenses, commissions, and payment, in accordance with the terms of the agreement. A copy of said agreement is attached as Exhibit "C" hereto. 37

5. Said agreement by its terms became effective January 1, 1933. Thereafter, pursuant to laws and decrees of the German government of July 4, 1933 and February 15, 1934, the right to license and contract for the public performance of musical works was placed under the control of the Reichminister for Popular Enlightenment and Propaganda, and GEMA and GDT were dissolved and were replaced by STAGMA, which succeeded to the property, contract rights, and members of GEMA and GDT, and was declared by decree of the German government to be the exclusive agency to conduct commercial negotiations for the public performance of musical works. Upon the occurrence of such events the contract between ASCAP and GEMA and GDT was adopted and continued by ASCAP and STAGMA, and at all times since has remained in full force and effect between ASCAP and STAGMA. At all times since, material to this action, STAGMA has fully performed its obligations under the terms of said agreement. 38

6. Commencing January 1, 1933 and at all times subsequent thereto ASCAP has licensed in the United States, its territories and possessions, the performance of musical works vested in and controlled by STAGMA, has received and collected license fees for such performances, and has deducted and retained its expenses, commissions, and payment for such licensing and collection, but has failed and 39

refused to deliver to STAGMA the net sum of $116,371.59
40 collected during the period January 1, 1937 to September 4, 1943.

7. By Vesting Order No. 2097 executed September 4, 1943, filed with the Division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, the plaintiff vested in himself as Alien Property Custodian all the rights and interest of STAGMA in and to said contract of January 1, 1933, and all right, title, interest, and claim in and to the said sums so collected and withheld by ASCAP as set out herein, all
41 in compliance with law.

8. On September 11, 1943 the plaintiff made written demand on the defendant ASCAP for delivery of the license fees so collected and withheld by it. Pursuant to said demand ASCAP has delivered or is delivering to the plaintiff the net license fees collected by it on behalf of STAGMA subsequent to September 4, 1943, but at all times has refused and neglected to deliver to the plaintiff the fees so collected by it for the period January 1, 1937 to September 4, 1943 in the total sum of $116,371.59, all of which is due, owing, and unpaid.

42

WHEREFORE plaintiff demands:

1. That the court find and adjudge that the plaintiff, by his Vesting Order No. 2097, executed September 4, 1943, filed with the Division of the Federal Register December 4, 1943, and published in 8 Federal Register 16463 on December 7, 1943, has acquired full and complete title to the license fees and moneys collected for SACEM, AKM, and

STAGMA by the defendant ASCAP and withheld by it; that the defendant Henry M. Propper, receiver of the property and assets of AKM in the State of New York, has no title to nor interest in said assets of AKM superior to that of this plaintiff; and that the purported acquisition of title by the said Henry M. Propper, receiver, is null and void as against this plaintiff. 43

2. That the plaintiff have judgment against the defendant ASCAP in the sum of $392,959.88, together with interest and costs.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff 44

By: THOMAS G. DONLAN,

Thomas G. Donlan,
Assistant United States Attorney.
Office and Post Office Address:
United States Court House
Foley Square
New York, N. Y.

45

EXHIBIT B ANNEXED TO COMPLAINT

AGREEMENT made the first day of January, 1933, be-
46 tween

GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (AKM), of Baumannstrasse 8, Wien, III, Austria, hereinafter designated as "AKM", and

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, of 1501 Broadway, New York, N. Y., U. S. A., hereinafter designated as "ASCAP", as follows:

I

47 Subject to the restrictions provided in Clauses II, Paragraph B, III, IX and X of this agreement AKM warrants and represents that it has acquired, and neither assigned to anybody else nor released, and agrees that it will during the entire term of this agreement and any extension thereof for the purposes hereinafter mentioned neither assign to anybody else nor release the exclusive right to license in the UNITED STATES OF AMERICA, ALASKA, PUERTO RICO, PHILIPPINE ISLANDS, VIRGIN ISLANDS, HAWAII, and its Colonies and Possessions, non-dramatic public performances of the musical works copyrighted by its respective members, a list of whom is
48 hereto attached marked "Schedule I" and made a part hereof.

II

A. AKM hereby grants to ASCAP the sole and exclusive right to license in the above territory non-dramatic public performances for profit of musical works the performing rights of which are now or may, during the term hereof, be vested in or controlled by it.

B. It is therefore understood and agreed, that there shall be excluded from the operation of this agreement all dramatico-musical works, musical plays, musical comedies, operas, operettas as such, symphonic works and all other categories of works the public performance of which are considered in the United States of America as involving "grand rights"; it being understood however that the right to license performances of separate musical compositions, fragments or selections forming a part of such works, in non-dramatic, non-stage renditions are included under the terms hereof in accordance with Paragraph A. 49

C. AKM is within sixty (60) days from the execution of this agreement to furnish ASCAP with a complete list showing the title, name of the composer, author (if any) and publisher, of each and every copyrighted symphonic work except those referred to in Clause III intended to be excluded from the operation of this agreement. Moreover AKM agrees from time to time hereafter during the term hereof to furnish ASCAP the same information in relation to each and every new symphonic work copyrighted by any of its members which should be excluded from the operation of this agreement. 50

III 51

It is understood that there shall be excluded from the operation of this agreement and of Clause II next above all musical compositions copyrighted by Universal-Edition, Vienna, and subsidiary catalogs of the firms Otto Maass, Vienna, Albert J. Gutmann, Vienna, Wiener Operetten-Verlag G. m. b. H., Vienna and Wiener Philharmonischer Verlag, Vienna, as well as Harmonie-Verlag, G. m. b. H., Berlin and the C. F. Adler Edition G. m. b. H. Berlin.

Exhibit B Annexed to Complaint

IV

52 With the restrictions provided in Clauses II Paragraph B. IX and X of this agreement ASCAP warrants and represents that it has acquired and neither assigned to anybody else nor released and agrees that it will during the entire term of this agreement and any extension thereof for the purposes hereinafter mentioned neither assign to anybody else nor release the exclusive right to license in the REPUBLIC OF AUSTRIA non-dramatic public performances of the musical works of its respective members, a list of whom are hereto attached marked "Schedule B" 53 and made a part hereof.

ASCAP hereby grants to AKM the sole and exclusive right to license in the REPUBLIC OF AUSTRIA the non-dramatic rendition in public performances of musical works the performing rights of which are now or may during the term hereof be vested in or controlled by ASCAP.

V

The terms "public performance for profit" and "public performance" hereinbefore used, shall be construed to mean 54 vocal, instrumental and/or mechanical renditions and representations in any manner or by any method whatsoever, including performance by radio broadcasting stations, by telephony and/or "Wired Wireless"; and/or reproductions of non-dramatic renditions by means of devices for reproducing soundrecorded in synchronization or timed relation with motion pictures, provided however, that in the case of dramatico-musical works, musical plays, operas, operettas, musical comedies and works of a similar character, such

performances shall be limited to the separate numbers, fragments or arrangements, melodies or selections forming a part or parts thereof, and shall not include the right of public performance of such works in their entirety or of any part thereof as stage plays, or as a part of stage plays, all of which rights, including all other rights not in this agreement expressly enumerated, are hereby reserved and retained to their members by ASCAP and AKM respectively, and by the respective composers, authors and publishers of such musical works. 55

VI

56

Each of the parties hereto agrees to require of and collect from its licensees, for the public performance of the musical works referred to in Clauses II and IV hereof, payment therefor upon the same basis and in the same manner as is now in accordance with and to the extent of the respective copyright laws in force and effect between each Society and its respective licensees with respect to the musical works referred to in Clauses II and IV hereof, and that each Society will account for and pay over to the other such monies in respect of the public performance of such musical works as is hereinafter provided in accordance with its respective statutes. 57

VII

A. Each of the parties hereto shall account to the other for each calendar year during the term hereof on or before each 30th September succeeding the close thereof.

B. Such accountings shall be made by the respective parties, each to the other in accordance with their respec-

tive statutes and all accountings shall be made in as com-
58 plete detail as may be practicable under their respective systems of operation. Distributable sums under such accountings shall be subject to deduction only and solely of such amount as may be assessed against them on account of taxes payable to municipal, state and federal governments.

Under any and all circumstances however amounts accruing to the credit of composers, authors and publishers of every party shall be paid directly to the Society of which they are members and shall not in any case be diverted for
59 any reason whatever to the credit of any publisher-member of the accounting Society.

VIII

A. ASCAP agrees during the term hereof to use its best endeavors to gather daily data covering completely the musical programs as rendered by the two principal broadcasting networks in the U. S. A. (National Broadcasting Company and Columbia Broadcasting System respectively, or their successors), together with similar data regarding the musical programs rendered by a selected number of
60 independent broadcasting stations not affiliated with either of said networks but located in various sections throughout the entire country.

B. From such program data, as rendered by the said networks and stations, ASCAP undertakes to prepare semiannually and furnish to AKM a summary which shall show the total number of broadcast performances of works identifiable in such programs as from the repertoire of AKM.

Exhibit B Annexed to Complaint

C. There shall for every identifiable copyrighted work listed on the programs gathered in accordance with Paragraph A hereof be given to each party interested due credit for each performance. There shall for every identifiable copyrighted arrangement of a non-copyrighted work be given to the copyright owner one-half the amount of credit which is credited to works under original copyright. Parties interested are exclusively publishers. Credits in respect of works shall be entered to the respective accounts as follows: 61

1. The repertoire of ASCAP.

2. The repertoire of each foreign performing right society with which ASCAP may have reciprocal relations or act for it as agent. 62

3. The repertoire of each foreign country with which ASCAP may have no relationship.

4. Works not identifiable with any of the above mentioned repertoires.

Points in respect of the works referred to in subparagraph E hereof shall be divided as per the mode of distribution stipulated in subparagraph E-a and b hereafter. 63

D. From the total number of such points there shall be computed the proportion thereof contributed by the repertoire of AKM and the amount due to AKM from ASCAP each year during the term hereof shall be exactly in proportion as the number of their points in relations to the total bears to the total distributable net revenue of ASCAP during the same period.

Exhibit B Annexed to Complaint

64 E. Where a member of AKM has assigned the U. S. A. copyright in a work to an American publisher, it is agreed as follows:

a. If in the contract conveying such work no reservation was made by the conveying member of AKM of any interest in the petits droits in such event the publisher's share shall be credited to the ASCAP member. If however any such reservation is made the publisher's share of any such credits shall be distributed in accordance therewith. In no case shall the share of the writer(s) however be diminished.

65 b. In case an agreement had been made with regard to the distribution of the performing rights ASCAP shall account to AKM in accordance with this agreement, provided however, that such agreement has been ratified by each of the societies.

c. If the parties originally interested (composer, author and publisher) are members of different societies, the amount accruing to the credit of each of these parties shall be paid directly to the respective societies.

66 F. If at any time during the term of this agreement ASCAP shall be unable to secure such daily data as is described in Paragraph A hereof, it shall promptly notify AKM to that effect whereupon AKM may terminate this agreement immediately. For the period up to the date of termination ASCAP shall account to AKM in accordance with the formula provided in subparagraphs C and D hereof to the extent that such data has been obtained. It is understood however, that even in the case of such termina-

tion of this agreement AKM shall represent ASCAP in Austria up to the end of the then current year and ASCAP shall represent AKM in the territory in which it functions for a similar period. From such termination and for the balance of any period during which AKM shall represent ASCAP in Austria, ASCAP shall pay to AKM a sum at the same rate as had been determined to be AKM'S participation during the period in which ASCAP received such daily data. 67

G. Supplemental to and in support of the data prepared in accordance with subparagraphs A, B and C hereof, there shall also be dispatched all the original programs from which the data contained in the statements was compiled. AKM shall be entitled to retain possession of such original programs for a period of not less than thirty days from the receipt thereof, and upon request of ASCAP shall then forward the same complete as received, carrying charges prepaid, as may be directed by ASCAP. 68

H. Inasmuch as ASCAP will receive such original programs in strict confidence from the sources, and will covenant that no disclosure of the contents thereof shall be made to any copyright owner whose works are not embraced under the licenses issued by ASCAP, it is of the essence of this agreement, and AKM agrees, that they will not divulge or expose the contents of such original programs to any but their members and then permit only a personal inspection, and that under no circumstances will they permit any copies thereof or of any of the particulars thereof to be made and removed from their files and premises. 69

Exhibit B Annexed to Complaint

IX

70 Each of the parties hereto is to have the right without effect upon the continuance of this agreement to notify the other of the withdrawal of the entire repertoire of any individual member of either party solely and only in case of the discontinuance under the statutes of the particular society of the membership which controls the withdrawn repertoire. Moreover, it is to be the obligation of each party hereto to notify promptly the other party of each and every such discontinuance of a membership which controls a repertoire or any part thereof.

71

X

Each of the parties hereto grants to the other the rights and licenses set forth in Clauses II and IV hereof, subject always, however, to any right of the author, composer or publisher of any musical work to remove any musical work from the repertory of such respective party and/or to revoke, modify or limit any performing right which he or it may have granted to such party, to the extent to which any such composer, author or publisher may have the right so to do in accordance with the statutes and rules of the 72 respective society, and in the event of any such removal, revocation, modification or limitation each of the parties hereto shall give to the other immediate notice thereof.

XI

This contract is declared to be personal with respect to each of the parties hereto and neither party shall assign

the same or any rights therein granted or arising therefrom, without the written consent of the other party first had and obtained, except insofar as each party shall have the right to issue licenses for the giving of public performances of the musical works contained in the repertoire of the other party. Nor shall this contract be deemed to be assignable by operation of law, devolution or legal proceedings. 73

XII

Each of the parties hereto hereby irrevocably during the term of this agreement authorizes, empowers and vests in the other party the right, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work coming within the purview of this agreement to institute and prosecute actions to retain and recover damages for the infringement or violation of the rights granted to the grantee under this contract, and to release, compromise or refer to arbitration, in the grantee's discretion, any and all actions in the same manner and to the same extent and to all intents and purposes as the grantor and/or the owners of the copyright of such musical work might or could do. And each of the parties hereto hereby makes, constitutes and appoints the other party its true and lawful attorney irrevocably during the term of this agreement, in the name of the grantor or in the name of the grantee, or in the name of the owner of the copyright or copyrights of any musical work to do all acts, take all proceeding and execute, acknowledge and deliver any and all instruments and documents that may be necessary, proper or expedient and recover damages, under the copyright of 74 75

such musical works or otherwise, for the infringement or
76 other violation of the rights hereby granted in such works, and to release, compromise and refer to arbitration any such proceedings or actions or to make any other dispositions of differences in relation to the premises.

XIII

Each party hereto shall supply the other as far as possible with any particulars relating to the musical works in their respective repertoires which may be deemed necessary in their mutual interests.

77

XIV

Each of the parties hereto agrees, during the term hereof, to execute, acknowledge and deliver to the other party in as far as possible such assurances, powers of attorney or other authorities or instruments as may be deemed necessary or expedient by such party to enable it to exercise and enforce in its own name, or otherwise, all the rights, remedies and privileges granted to it under this contract. The relative costs will be borne by the Society which calls for these documents.

78

XV

Each of the parties hereto agrees that it will not accept into membership any composer, author or publisher, who is a member of the other Society at the time when this agreement is made or who shall become a member of the other Society during the term hereof and who has granted

as to ASCAP his rights also for the territory named in Clause IV hereof, and as to AKM the territory named in 79
Clause I hereof, unless the other party shall consent thereto in writing. That it will not represent in any manner, during the term hereof, any other organization or Society resident in the said territories respectively having purposes or objects similar to those of either of the parties hereto.

XVI

Each of the parties hereto shall have the right to appoint in writing a representative, to take up in its behalf 80
and examine into, during customary business hours, any matter arising in respect of the relations covered by this agreement.

XVII

This agreement shall be effective as of the 1st January, 1933, and shall continue indefinitely thereafter subject to the right of either party by written notice served upon the other before the 30th day of June of any year to terminate the agreement as at the end of the then current year. In the event of any such termination by either party 81
hereto, the parties shall each account to the other in full and according to the terms hereof covering all operations for that year.

Exhibit B Annexed to Complaint

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed by their respective duly authorized officers and their respective seals hereunto affixed the day and year first above written.

GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (AKM)
GESELLSCHAFT
DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER (A.K.M.)

registrierte Geno schaft mit illegible

By Illegible

By Illegible

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

By GENE BUCK
Gene Buck, President.

Answer of Defendant Henry M. Propper, etc.

DISTRICT COURT OF THE UNITED STATES, 85

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

The defendant, Henry M. Propper, as Receiver as aforesaid, by his attorney, A. Walter Socolow, answering Count 2 of the complaint herein, alleges: 86

I: Denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs marked and designated as "9" and "10" of said Count in said complaint.

II: Denies each and every allegation contained in paragraphs marked and designated as "11" and "12" of said Count of said complaint.

III: Admits each and every allegation contained in paragraphs marked and designated as "1", "2", "3", "4", "5", "6", "7" and "8" of said Count in said complaint, but further alleges that defendant ASCAP failed and neglected to remit to A. K. M. or to turn over to it other sums and property in addition to the sum alleged in paragraph "7" of said Count in said complaint. 87

88 *Said Defendant, Further Answering Count 2 and as and for a First, Separate and Distinct Defense Thereto, Alleges:*

IV: That it appears upon the face of Count 2 of said complaint that the same does not state facts sufficient to constitute a cause of action.

Said Defendant, Further Answering Count 2 in Said Complaint and as and for a Second, Separate and Distinct Defense Thereto, Alleges:

89 V: That it appears upon the face of said Count in said complaint that the Court has no jurisdiction of this action.

Said Defendant, Further Answering Count 2 in Said Complaint and as a Third Separate and Distinct Defense Thereto Alleges:

VI: That at the time of the appointment of defendant as Temporary Receiver, as hereinafter alleged, and for a considerable time prior thereto, said A. K. M. had assets within the State of New York, including the indebtedness due it from the defendant ASCAP referred to in said Count 2 of the complaint herein.

90

VII: That at the time of the appointment of defendant Henry M. Propper as Receiver, as hereinafter alleged, and for a considerable time prior and subsequent thereto, there was and still is in full force and effect in the State of New York a general statute known as Section 977-b of the Civil Practice Act of the State of New York, originally enacted by laws of 1936, Chapter 917 of the State of New York,

effective June 8, 1936, as amended by laws of 1938, Chapter 604 of the State of New York, effective April 9, 1938 and as further amended by laws of 1941, Chapter 926 of the Laws of the State of New York, effective May 1, 1941, relative to receivers to liquidate the local assets of foreign corporations, a copy of which statute, as amended as aforesaid and as existing at the time of the appointment of said defendant Henry M. Propper as Receiver, and as continued thereafter and still continues, is hereto annexed and made part hereof and marked "Exhibit A". 91

VIII: That on or about the 9th day of June, 1941, while said statute was in full force and effect in said State of New York, one Franz Sobotka, then a resident of the State of New York within the United States, commenced an action in the Supreme Court of the State of New York, County of New York, against the said A. K. M., the foreign corporation referred to in paragraph "4" of Count 2 of the complaint herein, alleging that he is a stockholder and creditor of said A. K. M., that the said A. K. M. had been liquidated and ceased to do business and other facts sufficient to give to the Supreme Court of the State of New York jurisdiction to appoint a receiver to liquidate the local assets of said A. K. M. within the State of New York pursuant to said statute and praying for judicial administration thereof and judgment and other relief in accordance with said statute. 92 93

IX: That thereafter and on or about the 12th day of June, 1941, upon proper application therefor, an order was duly made in said action, hereinabove in paragraph "VIII" described, appointing the defendant Henry M. Propper a Temporary Receiver of all assets of said A. K. M. in the

State of New York, with all rights and powers provided
94 for by said statute, a copy of which order is hereto annexed and made part hereof and marked "Exhibit B".

X: That on or about the 9th day of July, 1941 and prior to the commencement of this action, there was duly served upon the said ASCAP a certified copy of said order appointing defendant Temporary Receiver, as aforesaid, and a certificate of the Clerk of the County of New York certifying the qualification of this defendant as Temporary Receiver, together with a written demand, a copy of which is hereto annexed and made part hereof and marked "Ex-
95 hibit C", requiring said ASCAP, among other things, forthwith to pay to this defendant as such Temporary Receiver any and all moneys due and payable from said ASCAP to the said A. K. M. under said agreement; but the said demand has not been complied with in whole or in part and no part of said sum has been paid.

XI: That pursuant to and by virtue of the statute of the State of New York under which the defendant was appointed Temporary Receiver, as aforesaid, title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which said
96 A. K. M. then owned, was entitled to or might be entitled to claim or receive within the State of New York, vested in this defendant as such Temporary Receiver immediately upon the making of the order appointing him such Temporary Receiver.

XII: That thereafter such proceedings were had in said Supreme Court of the State of New York in said Sobotka action, hereinabove in paragraph "VIII" described, after

due and proper service of the summons in said action upon the defendant AKM in accordance with the provisions of said statute (Section 977-b) and otherwise in compliance therewith that on or about the 29th day of September, 1941 a final judgment was duly entered in said action pursuant to Subdivision 10 of said Section 977-b continuing defendant Henry M. Propper as Permanent Receiver to liquidate the assets, credits, choses in action, and property, tangible and intangible, in the State of New York of said A. K. M. in the manner provided for in said statute (Section 977-b), a copy of which final judgment is hereto annexed and made part hereof and marked "Exhibit D". 97 98

XIII: That all proceedings in said Sobotka action from the commencement thereof to the entry of said final judgment were regular and in accordance with the forms and statutes of the State of New York and the rules and practice of the Supreme Court of the State of New York in said County; and that the said order appointing this defendant Temporary Receiver and said final judgment continuing this defendant as Permanent Receiver, made and entered in said action as aforesaid, continued ever since and still are in full force and effect.

XIV: That subsequent to the order appointing defendant Henry M. Propper Temporary Receiver, and prior to said final judgment making him a Permanent Receiver, as aforesaid, and on or about the 29th day of July, 1941, pursuant to leave granted to defendant Henry M. Propper, as Temporary Receiver, by order made and entered in said Supreme Court of the State of New York, County of New York, on the 23rd day of July, 1941 in said Sobotka action, 99

100 an action was commenced by this defendant in the Supreme Court of the State of New York, County of New York, against the defendant ASCAP to recover from the defendant ASCAP the amount of the indebtedness due from it to the defendant A. K. M.; that said action is still pending and undetermined and is on the Reserve Calendar of said Supreme Court awaiting trial.

XV: That by reason of the premises A. K. M. had been divested of all right, title and interest in and to any and all property and assets within the State of New York, including the indebtedness referred to in Count 2 of the com-
101 plaint herein prior to the vesting order referred to in paragraph "9" of said Count 2, and that all right, title and interest in said property and assets including said indebtedness due from defendant ASCAP was at all of said times and still is in the defendant Henry M. Propper as Receiver, as aforesaid, and under the jurisdiction, possession and administration of the Supreme Court of the State of New York, for disposition in accordance with the provisions of said statute (Section 977-b).

Said Defendant, Further Answering Count 2 of Said Com-
plaint Herein, and as and for a Fourth, Separate and
102 *Distinct Defense Thereto, Alleges:*

XVI: The said defendant Henry M. Propper reiterates, repeats and realleges each and every allegation contained in paragraphs marked and designated "VI", "VII", "VIII", "IX", "X", "XI", "XII", "XIII" and "XIV" of this answer with the same force and effect as if the same were set forth herein.

XVII: That thereafter pursuant to the provisions of said final judgment and in compliance with subd. 11 of said statute (Section 977-b), proper notice was duly given and published requiring all creditors of A. K. M. to present and file claims with the defendant Henry M. Propper, as Receiver as aforesaid, and that pursuant to said notice a number of claims have been filed with the defendant Henry M. Propper as Receiver, aggregating approximately One Hundred Thousand ($100,000.00) Dollars, by a number of persons claiming to be creditors of said A. K. M.; that all of said claims were filed and all rights thereunder under said statute were acquired long prior to the vesting order alleged in paragraph "9" of said Count 2 of the complaint herein. 103 104

XVIII: Upon information and belief that all the persons who thus presented and filed claims with this defendant as Receiver were at all of said times and still are residents of the State of New York, or elsewhere in the United States; that some of them were and still are citizens of the United States and none of them was or is an alien enemy.

XIX: That none of said persons who so presented and filed claims with this defendant Henry M. Propper as Receiver, as aforesaid, is a party to this action, but all of them have by the filing of their respective claims, as aforesaid, made themselves and are now parties to said Sobotka action. 105

Said Defendant, Further Answering Said Count 2 of the Complaint Herein, and as and for a Fifth, Separate and Distinct Defense Thereto, Alleges:

XX: The said defendant Henry M. Propper reiterates, repeats and realleges each and every allegation contained

in paragraphs marked and designated "VI", "VII", "VIII",
106 "IX", "X", "XI", "XII", "XIII" and "XIV" of this answer with the same force and effect as if the same were set forth herein.

XXI: That prior to the commencement of the action by this defendant Henry M. Propper as Temporary Receiver and against the defendant ASCAP, as aforesaid, and on or about the 7th day of July, 1941 an order was duly made in said Sobotka action authorizing this defendant Henry M. Propper, as Temporary Receiver, as aforesaid, to retain and employ A. Walter Socolow and Hendricks,
107 Robbins & Buttenwieser, as attorneys to advise him as such Receiver and to render legal services in connection with said receivership, as more particularly set forth in said order, a copy of which order is hereto annexed and made part hereof and marked "Exhibit E".

XXII: That at the time of the commencement of said action by this defendant Henry M. Propper, as Temporary Receiver against the defendant ASCAP, as aforesaid, and for a considerable time prior and subsequent thereto, there was and still continues to be in full force and effect within the State of New York, a general statute known as Section
108 475 of the Judiciary Law of the State of New York relative to attorney's liens, as follows:

> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which

attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34 eff. Sept. 1, 1938." 109

XXIII: That prior to the commencement of said action by this defendant Henry M. Propper as Temporary Receiver, as aforesaid, against the defendant ASCAP, said A. Walter Socolow and Hendricks, Robbins & Buttenwieser were duly employed and retained by this defendant as attorneys for such Receiver and since July 31, 1941 to date have rendered considerable professional services in connection with said action and otherwise, in accordance with the said order "Exhibit E" hereof. 110

XXIV: That by reason of the premises the said A. Walter Socolow and Hendricks, Robbins & Buttenwieser have acquired a lien upon the indebtedness alleged in said Count 2 of the complaint herein in accordance with said statute, in addition to their retaining lien on all papers in their possession, and otherwise, from the commencement of said action by this defendant against defendant ASCAP, and long prior to the vesting order alleged in paragraph "9" of said Count 2 of the complaint herein. 111

XXV. That neither said A. Walter Socolow nor Hen-
112 dricks, Robbins & Buttenwieser is a party to this action, but both of them are subject to the jurisdiction of the Supreme Court of the State of New York in said Sobotka action.

WHEREFORE, this defendant demands judgment dismissing said Count 2 of the complaint herein, together with the costs and disbursements of this action.

A. Walter Socolow
Attorney for Defendant Henry M.
113 *Propper, as Receiver, etc.,*
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

114

EXHIBIT A ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, etc.

Sec. 977-b. *Receivers to liquidate local assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise. 115 116

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided. 117

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified com-

plaint alleging that the defendant is a foreign corporation
118 and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take,
119 receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint containing the allegations set forth in subdivision four hereof, and upon an affidavit
120 reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation or against whom a claim or demand in favor of such foreign

corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver. 121

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six successive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

122

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made. 123

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

124 10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

125 11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less
126 than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and a statement showing the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership. 127

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances. 128 129

15. Upon the return date of such application, or at such other time fixed by the court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in the discretion of the court, to the receiver or liquidator, if

any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto. 133

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or 134
organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind 135
whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspen-

sion, revocation or annulment of its charter or organic
136 law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts
137 of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution,
138 nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Noth-

ing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile. 139

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor. 140

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation. 141

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or his

predecessor in interest, of any asset of said corporation in
142 the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the in-
143 valid provision or application, and to this end the provisions of this act are declared separable.

144

EXHIBIT B ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

145 At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse thereof, in the Borough of Manhattan, City of New York, on the 12th day of June, 1941.

Present:

HON. SAMUEL I. ROSENMAN,

Justice

146 FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

Upon reading and filing the summons herein dated the 9th day of June, 1941, the complaint verified the 9th day of June, 1941, and the affidavits of Franz Sobotka and A. 147 Walter Socolow, both sworn to the 9th day of June, 1941 and it appearing to the satisfaction of the Court that personal service of the summons herein cannot be effected within the State of New York with due diligence and that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible, within the State of New York and that the defendant has been liquidated and that it has ceased doing business

Now, on motion of A. Walter Socolow, attorney for the
148 plaintiff, for the appointment of a Temporary Receiver of the property within the State of New York of the defendant and after hearing A. Walter Socolow, attorney for the plaintiff in support of said motion, it is

ORDERED, that HENRY M. PROPPER of No. 42 East 41st Street, New York, be and he hereby is appointed Temporary Receiver pending the determination of this action, and that the said Receiver be and he is hereby directed to take, receive and reduce to his possession any and all assets, property, credits and choses in action and property,
149 tangible and intangible, within the State of New York, of the defendant, and hold the same until the further order of this Court; and it is further

ORDERED, that the said Temporary Receiver shall have all the powers and duties in addition to those herein provided for, as are possessed by and conferred upon Receivers and Trustees by the laws of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver shall before entering upon the
150 duties of his trust, execute to the People of the State of New York, and file in the office of the Clerk of the County of New York his bond with sureties to be approved by a Justice of this Court in the penal sum of $1,000.00 Dollars, conditioned for the faithful performance of his duties as such Receiver; should the property coming into the hands of the Receiver exceed this amount, Receiver is to apply to this Court for an order increasing the amount of his bond.

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver may at any time, upon proper notice to all parties who have appeared in this action, apply to this Court for further and other instructions and powers necessary to enable the said Temporary Receiver to fulfill his duties; and it is further 151

ORDERED, ADJUDGED AND DECREED that the said Temporary Receiver shall forthwith deposit all monies received by him in his own name as Temporary Receiver in the National City Bank, New York and no withdrawals shall be permitted therefrom, except as directed by this Court. 152

Enter

S. I. R.
J. S. C.

153

EXHIBIT C ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

154

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW-YORK

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

155

Defendant.

SIRS:

PLEASE TAKE NOTICE, that by an order of the Supreme Court of the State of New York, in and for the County of New York, made in the above entitled action on the 12th day of June, 1941 and entered in the office of the Clerk of the County of New York on the 13th day of June, 1941, now on file in the office of the Clerk of the County of New York, a certified copy of which is herewith served upon you, the undersigned was duly appointed Temporary Receiver of the property and assets of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M. (hereinafter referred to as the defendant corporation) within the State of New York and that the undersigned has duly qualified and now is acting as such Temporary Receiver as shown from the Certificate of qualification herewith also served upon you.

156

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, demand is hereby made upon you that you forthwith pay to the undersigned as such Temporary Receiver any and all claims or demands now existing in favor of said defendant corporation and against the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP) and particularly:

1. Certain claims and demands for moneys collected by and due from said ASCAP to the defendant corporation as license fees, royalties and other income from various licenses on account of the performance in the United States and its territories and possessions of the musical works and compositions of members and/or shareholders of the defendant corporation pursuant to an agreement between the defendant and the said ASCAP, dated the 1st day of January, 1933, as originally entered into, and as extended or renewed from time to time thereafter, and any and all other agreements between said ASCAP and the defendant corporation.

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, further demand is hereby made upon you that you forthwith turn over and deliver to the undersigned, as such Temporary Receiver, any and all property and assets belonging to said defendant corporation now in your possession or control and particularly:

1. The listings and catalogue of musical works and compositions of authors, composers and publishers who have been or are members and/or shareholders of the defendant corporation.

2. The performing rights within the United States
160 of America and its territories and possessions in and to any and all musical works and compositions of authors, composers and publishers who have been or are members and/or shareholders of the defendant corporation as shown in the listings and catalogue referred to in Item 1 hereof; and

3. Any and all other property and assets of whatsoever kind, nature or description, including (but not limited to) any and all books, records, papers and documents of whatsoever kind, nature and description,
161 belonging to the said defendant corporation.

PLEASE TAKE FURTHER NOTICE, that pursuant to said order, further demand is hereby made upon you that you forthwith render to the undersigned, as such Temporary Receiver, a just and true accounting of any and all transactions, dealings, acts, matters or things of whatsoever kind or nature arising out of or relating to the agreement between the said ASCAP and the defendant corporation, dated the 1st day of January, 1933, as originally entered into, and as thereafter renewed or extended, and any and all other agreements between said ASCAP and the
162 said defendant corporation and that upon such accounting you forthwith pay to the undersigned as such Temporary Receiver any and all moneys found due from you to the defendant corporation in addition to the moneys, property and assets hereinbefore referred to.

Exhibit C Annexed to Answer of Henry M. Propper, etc.

Dated, New York, July 7th, 1941.

Yours, etc.,

HENRY M. PROPPER
Temporary Receiver

A. WALTER SOCOLOW,
Attorney for Temporary Receiver,
Office & P. O. Address,
608 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
30 Rockefeller Plaza,
Borough of Manhattan,
City of New York.

EXHIBIT D ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.,

166 At a Special Term Part II of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse therein, in the Borough of Manhattan, City of New York, on the 29th day of September, 1941.

Present:

HON. PETER SCHMUCK

Justice

167

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

168 It appearing by the affidavits of FRANK J. CUMMISKEY and UPTON E. LIPTROTT, both sworn to the 27th day of August, 1941, and the affidavit of A. WALTER SOCOLOW, sworn to the 27th day of September, 1941, that the summons in the above entitled action was served on the defendant by publication and that more than twenty (20) days have elapsed since said service was completed and that the defendant has not appeared, answered or served a notice of motion addressed to the sufficiency of the complaint in the said action and that the said defendant

Exhibit D Annexed to Answer of Henry M. Propper, etc.

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M., is now in default, 169

NOW, on motion of A. WALTER SOCOLOW, attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED that HENRY M. PROPPER, of No. 12 East 41st Street, Borough of Manhattan, City of New York, the Temporary Receiver herein appointed by order of this Court, dated the 12th day of June, 1941, be, and he hereby is, appointed Permanent Receiver for the defendant; and it is further 170

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver be, and he hereby is, directed to receive and reduce to his possession any and all assets, credits, choses in action and other property, tangible and intangible, belonging to the defendant which the defendant may have, or be entitled to, or may be entitled to claim or receive in the State of New York, and to liquidate the same in the manner herein provided for, to wit: 171

1. That the said Permanent Receiver be, and he hereby is, directed to reduce to cash, as speedily as possible, any and all assets, credits, choses in action and other property,

tangible and intangible, of the said defendant which it may
172 have, or be entitled to, or may be entitled to claim or to receive in the State of New York and to give notice to all creditors and other persons interested in the said defendant by publishing once a week for three weeks in New York Law Journal and Journal of Commerce a notice, requiring such creditors and interested persons to present to said Receiver proof of their claims against or interests in the said defendant within sixty-five (65) days after the last date of publication.

2. That the said Permanent Receiver after the expira-
173 tion of the time limited by the published notice for the filing of the claims with him shall prepare and submit to the Court a detailed account showing the assets received, the dispositions thereof and the value of any claims or assets which may have not heretofore been reduced to cash with the full description of each and a statement showing the names and addresses of each and every claimant, and the name and address of his attorney, if any, and the amount and nature of the claim; and a statement of the allowance and disallowances thereof, and a statement of the costs and expenses of the action and of the Receivership.

174 3. That the said Permanent Receiver shall, after the filing of such account, give notice to all persons and their attorneys who have appeared in the action or filed claims with the Receiver by mail, to the addresses set forth in the proof of claim, or notices of appearance together with notice that on the date specified therein, no later than thirty (30) days thereafter, an application will be made to the Court for settlement of the Receiver's account and

for partial distribution in the event that all the assets are not reduced to cash, and for full distribution in the event that the assets have heretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances; and it is further 175

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver, before entering upon the duties of his trust execute to the People of the State of New York and file in the Office of the Clerk of the County of New York his bond with sureties to be approved by a Justice of this Court in the penal sum of $1,000,00 conditioned for the faithful performance of his duties as such Receiver; and that should the property and assets coming into the hands of said Receiver exceed this amount, said Receiver is to apply to the Court for an order increasing the amount of his bond; and it is further 176

ORDERED, ADJUDGED AND DECREED, that the said Permanent Receiver may at any time upon proper notice to all parties who have appeared in this action, apply to this Court for further and other instructions and powers necessary to enable the said Receiver to fulfill his duties; and it is further 177

ORDERED, ADJUDGED AND DECREED, that the said Receiver shall forthwith deposit all monies received by him in his own name as Permanent Receiver in the National City Bank and no withdrawals shall be permitted therefrom except as directed by this Court, and it is further

178 ORDERED, ADJUDGED AND DECREED, that the plaintiff herein may tax costs pursuant to statute and that the attorney for the plaintiff herein may apply for an allowance for services rendered herein and disbursements expended.

Enter

P. S.
J. S. C.

179

180

EXHIBIT E ANNEXED TO ANSWER OF DEFENDANT HENRY M. PROPPER, ETC.

At a Special Term, Part I of the Supreme Court of the State of New York held in and for the County of New York at the County Court house therein, in the Borough of Manhattan, City of New York, on the 7th day of July, 1941. 181

Present:

HON. SAMUEL I. ROSENMAN,

Justice.

FRANZ SOBOTKA, 182

Plaintiff,

—against—

STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.

Defendant.

The plaintiff above named having moved by order to show cause dated the 18th day of June, 1941 for an order revoking the appointment of Henry M. Propper as Temporary Receiver herein and appointing some other suitable person as Temporary Receiver in his place and stead, or in the alternative, directing that the above entitled action be discontinued without prejudice and that the order made herein on the 12th day of June, 1941 appointing a Temporary Receiver of the assets and property of the defendant within the State of New York be vacated and set aside without prejudice to any rights of the plaintiff and said 183

184 motion having duly come on regularly to be heard at Special Term Part I of this Court

AND on reading and filing the order to show cause dated the 18th day of June, 1941, and the affidavit of Franz Sobotka sworn to the 18th day of June, 1941 with proof of due service thereof and the reply affidavits of A. Walter Socolow and Aristides G. Lazarus, sworn to the 23rd day of June, 1941 and the 20th day of June, 1941 respectively and upon the filed papers herein all submitted in support of said motion and the affidavit of Henry M. Propper, sworn to the 19th day of June, 1941 and the further affi-
185 davit of Henry M. Propper, sworn to the 24th day of June, 1941 in opposition thereto and after hearing A. Walter Socolow, Esq. attorney for the plaintiff in favor of said motion and Hendricks, Robbins and Buttenweiser, Esqs. (Ira S. Robbins, Esq. of Counsel) attorneys for the Temporary Receiver herein in opposition thereto and it appearing to the satisfaction of the Court that special circumstances exist herein and that this is a particular case requiring the employment by the Temporary Receiver of additional counsel as provided for by Rule 180 of the Rules of Civil Practice and upon reading and filing the stipulation dated the 3rd day of July, 1941 and the affidavit of Franz
186 Sobotka, sworn to the 3rd day of July, 1941 and upon the consent to the entry of this order appearing at the foot hereof and due deliberation having been had and upon filing the opinion of the Court, it is

ORDERED, that the said motion be, and the same hereby is, disposed of as follows:

1. That Henry M. Propper, the Temporary Receiver herein be and he hereby is authorized to retain and

employ A. Walter Socolow, Esq. of No. 608 Fifth Avenue, Borough of Manhattan, City of New York, as his attorney to advise, appear for and represent him as such Temporary Receiver, in any and all steps, actions or proceedings against any third parties for the recovery or collection of any and all property and assets of the defendant corporation and for the reduction of any and all such property and assets into his possession as such Receiver. 187

2. That Henry M. Propper, the Temporary Receiver herein, be and he hereby is authorized to employ and retain Hendricks, Robbins and Butterweiser, Esqs. of No. 7 Dey Street, Borough of Manhattan, City of New York, as his attorneys to advise, appear for and represent him as such Temporary Receiver in any and all other matters and to advise him in connection with any papers in any of the steps, actions or proceedings referred to in Paragraph "1" hereof which may require his signature. 188

and it is further

ORDERED that the entry of this order upon the papers hereinabove recited be and the same hereby is deemed in full compliance with the provisions of Rule 180 of the Rules of Civil Practice and that upon the entry of this order the said Henry M. Propper, as such Temporary Receiver, be and he hereby is authorized to employ attorneys as hereinabove provided. 189

ENTER

S. I. R.
J. S. C.

Exhibit E Annexed to Answer of Henry M. Propper, etc.

Entry of the above order is hereby consented to.

190

Dated: New York, N. Y. July 3rd, 1941.

A. WALTER SOCOLOW
Attorney for Plaintiff

HENRY M. PROPPER
Temporary Receiver

HENDRICKS ROBBINS & BUTTENWEISER
Attorneys for Temporary Receiver

191

192

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

193

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. Civ. 35-581

[SAME TITLE]

The defendant, DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP), an unincorporated association of more than seven members, answering the complaint herein, by Schwartz & Frohlich, his attorneys: 194

COUNT 1.

1. Admits that on or about June 19, 1933, ASCAP and SACEM entered into an agreement in writing, of which a copy is set forth as Exhibit "A", annexed to the complaint, and denies each and every other allegation contained in paragraph 4, as said agreement Exhibit "A" speaks for itself. 195

2. Denies that at all times SACEM has duly performed its obligations under the terms of said agreement, Exhibit "A", annexed to the complaint, but admits that the said agreement became effective on or about January 1, 1933, and has remained in full force and effect, all as alleged in paragraph 5 of the complaint.

196 3. Admits that commencing January 1, 1933 and at all times thereafter, ASCAP has licensed the performance of musical works vested in or controlled by SACEM, and has received and collected license fees for such performances, and denies each and every other allegation contained in paragraph 6.

4. Admits that on September 11, 1943, plaintiff made written demand on ASCAP for delivery of license fees collected and withheld by it, and admits that in response to said demand ASCAP has delivered to plaintiff certain
197 moneys, but denies each and every other allegation contained in paragraph 8 of the complaint.

COUNT 2.

5. Admits that defendant, Henry M. Propper, claims to be a duly appointed Receiver of the property and assets of AKM, and claims to have title to the monies which are the subject of this Count 2, and denies each and every other allegation of paragraph 3.

6. Admits that on or about January 1, 1933, ASCAP
198 and AKM entered into an agreement in writing, a copy of which is set forth as Exhibit "B", annexed to the complaint, but denies each and every other allegation contained in paragraph 5, as said agreement, Exhibit "B", speaks for itself.

7. Admits that said agreement became effective January 1, 1933, and denies each and every other allegation contained in paragraph 6.

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

8. Admits that between January 1, 1933 and December 31, 1938, ASCAP licensed in the United States and its territories the performance of its musical works vested in or controlled by AKM, and received and collected license fees therefor, and denies each and every other allegation contained in paragraph 7. 199

9. Admits that on September 11, 1943, plaintiff made written demand on ASCAP for delivery of moneys collected by it, and denies each and every other allegation contained in paragraph 10.

200

COUNT 3.

10. Admits that on or about January 1, 1933 ASCAP entered into an agreement with GEMA and with GDT, a copy of which is annexed to the complaint as Exhibit "C", and denies each and every other allegation contained in paragraph 4, as said agreement, Exhibit "C", speaks for itself.

11. Admits that said agreement, Exhibit "C", by its terms became effective January 1, 1933, and that GEMA and GDT were replaced by STAGMA, and denies each and every other allegation contained in paragraph 5. 201

12. Admits that commencing January 1, 1933, ASCAP has licensed in the United States and its territories and possessions performance in musical works vested in and controlled by GEMA and GDT and their successor in interest, STAGMA, and has received and collected license fees for such performance, and denies each and every other allegation contained in paragraph 6.

Answer of Defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers

202 13. Admits that on September 11th, 1943, plaintiff made written demand on ASCAP for delivery of license fees, and that ASCAP has delivered to plaintiff certain monies, and denies each and every other allegation contained in paragraph 8 of said complaint.

As and for a Separate and Distinct Defense:

14. All three contracts, Exhibits "A", "B" and "C", annexed to the complaint, were treated by the parties as giving each the right to set off against the other excess monies
203 due after balancing accounts, and all funds allocable by each of the parties to the other were treated as current accounts, and from time to time the parties thereto by their own interpretation and construction of said contracts, treated all such funds as current accounts and rendered statements and made payments to each other in that manner.

15. That all of the parties to the contracts with ASCAP, Exhibits "A", "B" and "C", to wit: SACEM, AKM, GEMA, GDT and STAGMA, have failed to remit license fees collected by them in their respective countries to ASCAP, and that each of said foreign societies is presently indebted
204 for large sums of money to ASCAP, and there is a balance in favor of ASCAP as against each of said foreign societies in excess of many thousands of dollars, the exact amount of which is presently unknown to this defendant.

16. By reason of the premises, ASCAP, far from owing any moneys to any or all of said foreign societies, is entitled to receive and collect from each of said foreign societies presently many thousands of dollars, the exact

amount of which is presently unknown to this defendant, and there is not due and owing at the present time any monies from ASCAP to any of the said foreign societies or to the plaintiff by virtue of his writ of seizure. 205

WHEREFORE, defendant demands judgment dismissing the bill of complaint, with costs.

SCHWARTZ & FROHLICH
Attorneys for Defendant,
Deems Taylor, etc.

By LOUIS D. FROHLICH
Member of Firm 206

207

DISTRICT COURT OF THE UNITED STATES

208 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that upon the complaint herein and the answer of the defendant Henry M. Propper,
209 as Receiver, as aforesaid, now on file in the office of the Clerk of this Court, and upon the annexed affidavit of Henry M. Propper, sworn to the 28th day of May, 1946, the affidavit of Morris W. Primoff, sworn to the 27th day of May, 1946, and the affidavit of A. Walter Socolow, sworn to the 28th day of May, 1946, and the exhibits referred to and annexed to said answer and affidavits, and upon all the other papers and proceedings heretofore had herein, the undersigned will move this Court at a Stated Term thereof, to be held at Room 1306 of the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 11th day of June, 1946, at 10:30
210 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order

(1) pursuant to Subd. (c) of Rule 12 of the Rules of Civil Procedure, granting judgment on the pleadings herein dismissing the second count in the complaint herein, with costs to said defendant, on the ground that it appears upon the face of said count that the

same does not state a claim upon which relief can be granted, 211

or, in the alternative,

(2) pursuant to Rule 56 of the Rules of Civil Procedure, granting summary judgment dismissing the second count of the complaint herein, with costs to said defendant, on the ground that the pleadings herein and the said affidavits annexed hereto show that there is no genuine issue as to any material fact and that on the undisputed facts of record said second count makes out no claim upon which relief can be granted. 212

And for such other and further relief in the premises as to the Court may seem just and proper.

Dated, N. Y., May 28, 1946.

Yours, &c.,

A. Walter Socolow,
Attorney for Defendant
Henry M. Propper, etc.,
580 Fifth Avenue,
Borough of Manhattan, 213
City of New York.

To:

John F. X. McGohey, Esq.,
United States Attorney,
Attorney for Plaintiff.

Deems Taylor, as President of the
American Society of Composers,
Authors and Publishers, etc.

Affidavit of Henry M. Propper

DISTRICT COURT OF THE UNITED STATES

214 FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HENRY M. PROPPER, being duly sworn, deposes and
215 says:

I am one of the defendants in the above entitled action, being sued herein as a Receiver of the foreign corporation A. K. M., referred to in Count 2 of the complaint herein, and as such Receiver I have both title and possession of the subject of the action involved in said Count 2 of the complaint,—such title and possession having been vested in me as early as June 12, 1941 under the circumstances hereinafter referred to by the express provisions of Section 977-b of the New York Civil Practice Act, under which I was appointed Receiver.

216 This action is brought by plaintiff Alien Property Custodian to recover from defendant ASCAP certain sums of money owing from it to certain European performing rights societies, including AKM, claimed by this plaintiff to have been seized by him under his power and authority and in his capacity as Alien Property Custodian. I am joined as defendant in the action only with respect to Count 2 of the complaint, which relates to the indebtedness originally owed by ASCAP to AKM and the relief sought against

me is a judgment that I have acquired no title or right to the indebtedness in question. 217

As already stated, I was appointed Receiver in the action hereinafter stated, under Section 977-b of the New York Civil Practice Act.

Subdivision 19 of Section 977-b of the Civil Practice Act, under which I was appointed Receiver herein, provides, in part, as follows:

> "Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him." 218

Subdivision 20 of the same section also provides:

> "Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor." 219

Subdivision 16 of the same section, as amended by Laws of 1938, Chapter 604, in effect April 9, 1938, further provides:

"Upon settlement of the receiver's account, the court
220 must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state
221 prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes
222 of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with

their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto." 223

Subdivision 24 of the said section provides:

"The terms 'property' and 'assets' as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state."

224

It thus appears that under Subdivision 19 of said Section title to the assets and property, including choses in action, of the foreign corporation proceeded against thereunder vested in the Receiver from the date of his appointment. By Subdivision 20 possession of such assets and property, including choses in action, is deemed to be in the Receiver from the date of the service of the order of his appointment, together with a demand, and the beneficial interest is vested in the persons mentioned according to the priorities specified in Subdivision 16 which provides no interest whatsoever, legal or equitable, as remaining in the foreign corporation after the appointment of such Receiver. 225

I was appointed first a temporary receiver by order of Court and then was continued as permanent receiver by a final judgment of Court. Said order and final judgment were entered in an action brought in the Supreme Court of the State of New York, County of New York by one Franz Sobotka, as plaintiff, against AKM, as defendant, for the appointment of a Receiver to liquidate the local assets of said AKM, pursuant to and under said Section 977-b

of the Civil Practice Act. The judgment roll and all the
226 papers in said Sobotka action are now on file in the office of the clerk of the said Supreme Court of the State of New York, County of New York under file No. 12719/1941.

It appears from said judgment roll and papers in the Sobotka action that on June 12, 1941, an order was made in said Sobotka action by Mr. Justice Rosenman appointing me a Temporary Receiver with power and authority to take, receive and reduce to my possession any and all assets, credits, choses in action and property, tangible and intangible, in the State of New York of said AKM, and to hold the same until the further order of the said Su-
227 preme Court of the State of New York, and with all the powers and duties, in addition to those therein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York, as provided for in subds. 4 and 12 of said Section 977-b. I respectfully refer to said order, a copy of which is annexed to my answer herein as "Exhibit B", with the same force and effect as if annexed to this affidavit.

Thereafter, on July 9, 1941, pursuant to Subdivision 20 of said Section 977-b, there was duly served upon the defendant ASCAP a certified copy of said order appointing
228 me Temporary Receiver and a certificate of my qualifications as such Temporary Receiver, together with a written demand, requiring defendant ASCAP, to, among other things, forthwith pay to me as such Temporary Receiver any and all moneys due and payable from said ASCAP to AKM under the agreement which is the subject of this action. I respectfully refer to the said demand, a copy of which is annexed to my answer herein as "Exhibit E", with the same force and effect as if annexed to this affidavit.

Said demand not having been complied with, an order was made in the Sobotka action on July 23, 1941 authorizing me to bring an action against ASCAP, and such action was thereupon commenced on July 29, 1941, as hereinafter set forth. 229

Thereafter, on September 29, 1941, a final judgment was entered in said Sobotka action, pursuant to Subdivisions 10 and 11 of said Section 977-b, continuing me as Permanent Receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the State of New York of said AKM in the manner provided for in said Subdivision 11 of said Section 977-b.

I respectfully refer to said judgment, a copy of which is annexed to my answer herein as "Exhibit D", with the same force and effect as if the same were annexed to this affidavit. 230

Upon the entry of said final judgment, due notice to all creditors and other persons interested in said AKM was published. In accordance with the above quoted provisions in said final judgment, and pursuant to said notice, a number of claims were presented and filed with me aggregating in the neighborhood of one hundred thousand dollars.

All persons who thus presented and filed claims are residents of the State of New York and elsewhere in the United States. Some of them are citizens of the United States and none of them is an alien enemy. 231

The following is a partial list of the persons who thus filed claims with me, together with their addresses, amounts of the claim, etc.:

Name of Claimant	*Address*	*Amount of Claim*
Morris W. Primoff	1192 Park Avenue, New York City.	$ 762.98
Franz Sobotka	166 West 72nd Street, New York City.	22,737.18
Hermann Leopoldi	255 West 90th Street, New York City.	6,888.02
Luise Ascher	617 West 113th Street, New York City.	10,384.02
Ladislas Szucs	Beverly Hills, Cal.	48,302.92
Charles Hein	Los Angeles, Cal.	1,350.00

None of said claimants is a party to this action.

Prior to the said final judgment and after my appointment as Temporary Receiver, to wit, on July 29, 1941, pursuant to leave granted me by order made by, and entered in, the Supreme Court of the State of New York, County of New York on the 23rd day of July, 1941, granting me leave to commence an action against defendant ASCAP, I did commence such action against defendant ASCAP, suing therein as Receiver, for the recovery of the indebtedness theretofore owing from defendant ASCAP to the defendant AKM. Said action is still pending in the Supreme Court of the State of New York, County of New York, and is now on the Reserve Calendar awaiting trial. The complaint in said action alleges, and the amended answer of the defendant ASCAP therein admits, my appointment as Receiver by order of the said Supreme Court dated June 12, 1941, and my authorization to institute said action by order of the said Supreme Court dated July 23, 1941, both orders having been entered more than two years prior

to the issuance of the alleged order of the Alien Property Custodian. Paragraph "Fifteenth" of the complaint further alleges, and paragraph "9" of defendant ASCAP's amended answer further admits, 235

> "that on or about the 9th day of July, 1941, and prior to the commencement of this action there was served upon defendant a certified copy of an order purporting to appoint plaintiff Temporary Receiver of A. K. M., together with a written demand that defendant, among other things, pay to plaintiff any and all moneys due to the said A. K. M., and that defendant has made no payments to plaintiff." 236

It is clear that all of the foregoing, including my appointment as Receiver, the commencement of the action and the joinder of issue, were *ante bellum* acts and proceedings which took place long before the United States was forced into World War II on December 7, 1941. It is clear that long prior to World WAR II AKM had been completely divested of all right, title and interest, legal and equitable, to the assets in question, including the subject of the action and the cause of action herein by the aforesaid *ante bellum* acts and proceedings in accordance with the above quoted provisions of said Section 977-b. 237

The final judgment in the Sobotka action cannot be nullified, as it is sought to do by the instant action. The only thing which remains to be done by me under the judgment in the Sobotka action is the requirement that I, as Permanent Receiver of the assets of AKM in this State, file my accounting in the said Supreme Court and distribute the assets in my hands in accordance with the provisions of Section 977-b and the further order of the Court, after

recovering the proceeds of the action against ASCAP.
238 Should it appear on said final accounting that there are any funds in my hands as Receiver, after payment of claims of all local creditors, which may be the property of AKM, then, and only in such an event, would the Alien Property Custodian be entitled to receive such funds under the alleged vesting order. No distribution will be made by me to AKM under any circumstances without consultation with the Alien Property Custodian. The rights of the Alien Property Custodian to any property which may eventually be left in my hands after payment of local creditors may be asserted by filing a claim with me as Receiver, as indi-
239 cated in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463, at 480-481 and *Meyer et al.* v. *Petrograd Metal Works, et al.*, 256 App. Div. 1077, App. Den. 281 N. Y. 887. It is significant that no claim has been filed with me by the Alien Property Custodian and no demand whatsoever has been made upon me by that office, other than the commencement of this action.

The Court will note that the vesting order, which is the basis of Count 2 of the complaint herein, was issued on September 4, 1943, more than two years after my appointment as Temporary Receiver, and two years after my
240 appointment as Permanent Receiver, and two and one-half years before the commencement of this action. In other words, for two and one-half years nothing was done by the Alien Property Custodian with respect to the subject of Count 2 of the complaint herein until the institution of this action on April 22, 1946.

Prior to the institution of this action, however, to wit, on March 8, 1946, by Section 20 of the Trading With the Enemy Act, as amended by Public Law 322, 79th Congress, approved March 8, 1946, and by Section 32 of said Act,

as added by the said Public Law 322, the President of the United States, or such officer or agency as he may desig- 241
nate, was authorized to restore seized property to persons who are citizens of enemy countries and who were not hostile to the United States. By Executive Order 9725, issued by the President on May 16, 1946, the powers of authority of the President under said Sections 20 and 32, as thus amended and added, were conferred upon the Alien Property Custodian. Under said sections and said Executive Order, all property of Austrian nationals should, therefore, be released and is not subject to any rights of the Alien Property Custodian. Consequently, even con- 242
ceding, without admitting, that the Alien Property Custodian's vesting order in the instant case had any legal effect with respect to my property as Receiver, the Custodian's rights thereto would be terminated under the present policy of the United States, as reflected by Congressional action and the recent Executive Order. *A fortiori*, my right, title and interest to the property in question, acquired by me as Receiver long prior to World War II, and the rights of local creditors acquired through the receivership proceedings, cannot be questioned by the Alien Property Custodian or anyone else.

During all the times mentioned in the complaint herein 243
and in this affidavit, I was and still am a citizen of the United States and a resident of the State of New York, and, as already stated, the persons who filed claims against, and acquired rights to, the property and assets in question are residents of the State of New York and other parts of the United States, some of whom are citizens of the United States, and none of them was ever a national of a country which was hostile to the United States.

244 WHEREFORE, I respectfully pray that an order be made herein directing judgment on the pleadings, or summary judgment dismissing Count 2 of the complaint herein, with costs, and granting such other and further relief as to the Court may seem just and proper.

HENRY M. PROPPER

(Sworn to May 28, 1946.)

245

246

Affidavit of Morris W. Primoff

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

247

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MORRIS W. PRIMOFF, being duly sworn, deposes and says: 248

At all the times hereinafter mentioned, I was, and still am, a citizen of the United States and of the State of New York, and was, and still am, an attorney at law duly admitted to practice as such in the Courts of the State of New York. I am also a Certified Public Accountant. At all of said times, I resided and still reside, and had, and still have, my office for the practice of my profession in the City and State of New York. My present residence is at 1492 Park Avenue, Manhattan, and my office address is 551 Fifth Avenue, Manhattan.

I am a creditor of the above named A. K. M., upon a 249
certain claim and demand based upon the facts and circumstances following:

On the 27th day of January, 1939, more than two years prior to the appointment of the above named defendant Henry M. Propper, as Receiver of A. K. M., and, of course, two years before World War II, in an action by me as plaintiff and against A. K. M. as defendant, then pending in the Municipal Court of the City of New York, Borough

of Manhattan, Ninth District, in the City and State of
250 New York, a judgment was rendered in my favor as such plaintiff and against said A. K. M. as defendant, in the sum of Nine Hundred Ninety-two and 98/100 ($992.98) Dollars. A transcript of said judgment is hereto annexed and made part hereof, marked Exhibit A.

Said judgment was recovered upon a complaint alleging a balance due and owing me from A. K. M. on account of professional services in the field of taxation rendered by me to A. K. M. at its special instance and request, and disbursements incurred in connection therewith between on or about the 1st day of October, 1937 and the 1st day of
251 April, 1938, nearly four years before the appointment of the above named defendant as Receiver and World War II. Said professional services were rendered, and said disbursements were incurred within the City of New York, and the cause of action on said judgment was one which accrued within the City and State of New York. No part of the judgment recovered in said action has been paid except the sum of Two Hundred and Thirty ($230.00) Dollars, leaving a balance due me from said A. K. M. in the sum of Seven Hundred Sixty-two and 98/100 ($762.98) Dollars with interest from the 27th day of January, 1939, which is still due and owing me.

252 Pursuant to the directions of the judgment rendered in the action in which Mr. Propper was appointed a Receiver, and the notice to present claims published pursuant to said judgment, I duly filed with the above named Mr. Propper, as such Receiver, a proof of claim in due and legal form for the balance due me on said judgment, and thereupon I became a party to the action in which Mr. Propper was ap-

pointed Receiver. Under the provisions of Subdivision 16 of Section 977-b of the Civil Practice Act, pursuant to which Mr. Propper was appointed Receiver, I am one of the persons who have a beneficial interest in the assets and property of which Mr. Propper was thus appointed Receiver. 253

Neither I nor any of the other persons who have filed claims with said Receiver are parties to this action. I respectfully maintain that this Court may not therefore make any determination in this action which may affect the Receiver's title to the assets and the beneficial interest acquired by me and the other persons who have filed claims with the Receiver. Such determination would deprive me and the other claimants against the Receiver of our property without due process of law, and would be contrary to the decision of the Supreme Court of the United States in United States v. Bank of New York & Trust Company, 296 U. S. 463, at 480-481. 254

MORRIS W. PRIMOFF

(Sworn to May 27, 1946.)

255

EXHIBIT A ANNEXED TO AFFIDAVIT OF MORRIS W. PRIMOFF

256 Index No. 2401 Year 1939.

MUNICIPAL COURT OF THE CITY OF NEW YORK
Borough of Man.
9th District

Time of Docketing	Names of Parties Against Whom Judgment has been Obtained	Names of Parties in Wh Favor Judgment has be obtained
1/27/39	Staatlich Genehmigte Gesellschaft, Der Autoren, Komponisten und Musikverleger (A. K. M.), a corporation 11 West 42	Morris W. Primoff 551—5th Ave.

257

Amount of Judgment	
Damages,	$ 956.98
Costs,	$ 33.00
Prospective Fees,	$ 3.00
Total,	$ 992.98

258

A. Walter Socolow,
Attorney for
Judgment Creditor

I CERTIFY that the foregoing is a correct transcript of the docke of the above judgment. I further certify that the words "Not Sum moned" are written opposite the names of the following defendants:

Dated Nov. 8, 1945

Estelle M. Corcoran (Sea Clerk.

EXHIBIT B ANNEXED TO AFFIDAVIT OF MORRIS W. PRIMOFF

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PROOF OF CLAIM

FRANZ SOBOTKA,

Plaintiff,

—against—

STAATLICH, GENEHMIGTE GESELLSCHAFT, DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Defendant.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

MORRIS W. PRIMOFF, being duly sworn, deposes and says:

1. That he is one of the claimants herein.

2. That he resides at No. 1192 Park Avenue, in the Borough of Manhattan, City and State of New York.

3. That he is a creditor of Staatlich Genehmigte Gesellschaft Der Autoren, Komponisten Und Musikverleger (hereinafter referred to as A. K. M.) upon a certain claim and demand based upon the facts and circumstances hereinafter set forth.

Exhibit B Annexed to Affidavit of Morris W. Primoff

4. That on or about the 27th day of January, 1939, in
262 the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, in the City and State of New York, in an action therein duly pending after due personal service of the summons within said City and State upon said A. K. M. wherein deponent was plaintiff and the said A. K. M. was defendant, judgment was duly given in favor of deponent and against A. K. M. in the sum of $989.98.

5. That no part of said judgment has been paid, except the sum of $230.00, leaving a balance due deponent from said A. K. M. in the sum of $759.98 with interest from the
263 27th day of January, 1939, which deponent now claims.

WHEREFORE, deponent respectfully prays that his claim against said A. K. M. be allowed in the sum of $759.98 with interest as aforesaid, and for such other and further relief as may be just and proper.

MORRIS W. PRIMOFF

Sworn to before me this
10th day of June, 1942.

264 RUTH STEIGMAN
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission Expires March 30, 1943

Affidavit of A. Walter Socolow

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

265

[SAME TITLE]

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says:

266

At all the times hereinafter mentioned, I was, and still am, a citizen of the United States and of the State of New York, and was, and still am, an attorney at law duly admitted to practice as such in the courts of the State of New York, in the United States District Courts for the Southern and Eastern Districts of New York, the United States Circuit Court of Appeals, Second Circuit, and the United States Supreme Court.

At all of said times, I have resided and still reside, and had, and still have, my office for the practice of my profession in the City and State of New York. My present residence is 111 East 88th Street, in the Borough of Manhattan, City of New York, and my office address is No. 580 Fifth Avenue, in the Borough of Manhattan, City of New York.

267

I am the attorney for the defendant Receiver in the above entitled action, and am also his attorney in an action by said defendant as Receiver, now pending in the Supreme Court of the State of New York, County of New York,

against the defendant ASCAP to recover the indebtedness
268 which is the subject of the second count of the complaint in this action and other sums of money. I was engaged as such attorney by said defendant as Receiver pursuant to an order of the Supreme Court of the State of New York made in the action in which the said defendant was appointed Receiver, a copy of which order, dated the 7th day of July, 1941, is annexed to said defendant Receiver's answer to the complaint herein. Pursuant to said employment in accordance with said order, and pursuant to a further order made in the same action on the 23rd day of July, 1941, granting leave to said defendant as Receiver to com-
269 mence said action against the defendant ASCAP, said action against ASCAP was commenced on July 29, 1941 and I appeared as attorney for this defendant Receiver as plaintiff Receiver therein.

Upon the commencement of the action by Mr. Propper as Receiver against the defendant ASCAP in said New York Supreme Court in July, 1941, long before the United States entered into World War II, I acquired, and continue to have, by the express provisions of Section 475 of the Judiciary Law, a lien upon the subject of the action and the cause of action "from the commencement" thereof, for my services rendered and disbursements incurred there-
270 in. In addition to this said lien upon the cause of action and the subject of the action, I have an attorney's retaining lien upon all papers and documents in my possession relating to the cause of action and the action herein.

Since the commencement of that action considerable services were rendered in numerous proceedings, including examinations before trial, six appeals to the Appellate Division; four of them unsuccessfully taken by defendant

ASCAP as defendant therein, and several hundreds of dollars were advanced by me on account of the Receiver by way 271
of disbursements. I have to this date received nothing for my services or the disbursements thus advanced and incurred by me.

Considering the nature of said litigation, the extent of the services rendered, and the disbursements incurred, and all other facts usually taken into account in determining value of legal services, I verily believe that my lien upon said cause of action would be not less than, and in excess of, one-third (1/3) of the amount to be recovered herein.

By virtue of the provisions of Section 977-b of the New York Civil Practice Act, and Section 475 of the New York 272
Judiciary Law, and the order under which I was employed as attorney for the Receiver, under which said services were rendered and said disbursements were incurred, I have a vested right and interest in all the property and assets in question, including the cause of action against ASCAP, which right and interest were acquired by me before the war. I am not a party to this action and no determination in any way affecting my right and interest can be made herein.

WHEREFORE, I respectfully join in the application of the said defendant Receiver for judgment dismissing 273
the second count in the complaint herein.

A. Walter Socolow

(Sworn to May 28, 1946.)

Notice of Motion of Plaintiff

DISTRICT COURT OF THE UNITED STATES

274 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE].

The plaintiff, James E. Markham, Alien Property Custodian, on the annexed affidavit of James D. Hill, and on all of the pleadings, affidavits, admissions and papers on file herein, moves the court as follows:

275 1. For an order pursuant to Rule 12(c) of the Rules of Civil Procedure directing judgment on the pleadings in favor of the plaintiff and against the defendant, Henry M. Propper, receiver, or in the alternative,

2. For an order pursuant to Rule 56 of the Rules of Civil Procedure directing summary judgment in favor of the plaintiff and against the defendant, Henry M. Propper, receiver,

on the ground that the pleadings, affidavits, admissions, and other papers now on file herein show that there is no genu-
276 ine issue as to any material fact and that the plaintiff is entitled to a judgment against the defendant, Henry M. Propper, receiver, as a matter of law.

Dated at New York, New York June 20, 1946.

JOHN F. X. MCGOHEY
United States Attorney
United States Court House
Foley Square
New York, New York

Attorney for Plaintiff

STIPULATION

277

It is stipulated and agreed that the court may hear, consider, and determine the above motion for judgment on the pleadings or summary judgment in conjunction with the motion for judgment on the pleadings or summary judgment heretofore filed by the defendant Henry M Propper, receiver, dated May 28, 1946.

JOHN F. X. MCGOHEY
Attorney for Plaintiff

278

A. WALTER SOCOLOW
Attorney for Defendant
Henry M. Propper, receiver

SCHWARTZ & FROHLICH
Attorney for Deems Taylor, as President of the American Society of Composers, Authors, and Publishers, defendant.

279

Affidavit of James D. Hill

DISTRICT COURT OF THE UNITED STATES

280 FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

[SAME TITLE]

DISTRICT OF COLUMBIA, *ss.*:

JAMES D. HILL, being first duly sworn, deposes and

281 states:

I am attorney for James E. Markham, Alien Property Custodian, the above plaintiff, and as such prepared and caused to be served and filed the petition herein. I have read and am familiar with the answer, motion for judgment on the pleadings or summary judgment and affidavits submitted by the defendant, Henry M. Propper, receiver, and am familiar with the facts material to this action.

At all times material to this motion the American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP was and still is an unincorporated associa-

282 tion with principal place of business in the City and State of New York and being organized for the purposes of granting licenses and collecting royalties for the public performance of musical works of its members and allotting and distributing such royalties to its members.

At all times material hereto up to December 31, 1938, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, hereinafter referred to as AKM (state approved society of authors, composers and music

publishers) was a registered cooperative society with limited liability, organized and existing under the laws of the 283
Republic of Austria and being constituted for a similar purpose.

On or about the first day of January 1933 the said ASCAP and AKM entered into a written agreement, the terms of which are not material to this motion. Under the terms of said agreement said ASCAP has collected and retains in its possession for AKM a sum of money not less than $62,809.58.

On June 9, 1941 one Franz Sobotka, a national of Austria, 284
pursuant to §977-b of the New York Civil Practice Act, applied to the Supreme Court of New York for New York County for the appointment of a receiver for the property and assets within the state of New York of A. K. M., alleging that said AKM had been liquidated and had property and assets within the state of New York. Said action, entitled *Sobotka* v. *AKM*, 12719/1941, is still pending in the Supreme Court for New York County. The receiver has reduced no assets to possession and has made no distribution to creditors.

On June 12, 1941, pursuant to said application, Henry M. 285
Propper, the defendant herein, was appointed temporary receiver of the property and assets of AKM within the state of New York by an *ex parte* order signed and entered without notice and which authorized him to "take, receive and reduce to his possession * * * and hold until further orders of this court * * *" the property and assets of AKM within the state of New York. Said order did not purport to invest said temporary receiver with title to said assets.

286 On June 14, 1941, Executive Order No. 8389 was made applicable to property of nationals of Austria, thereby freezing said property and prohibiting the transfer of either title or possession thereto unless licensed.

On July 9, 1941, the said Propper, receiver, served upon the defendant ASCAP a copy of the order appointing him as temporary receiver, together with a written demand for delivery of any and all moneys held by ASCAP for AKM.

On July 29, 1941, the said Propper, as temporary receiver, commenced an action in the Supreme Court of New York for New York County against ASCAP to recover the
287 sum of $150,000 alleged to be due on the written contract between ASCAP and AKM dated January 1, 1933. Said action, which was originally entitled *Propper* v. *Gene Buck, as president of ASCAP*, is now entitled *Propper v. Taylor, as president of ASCAP*, 19537/1941, and is still pending in the Supreme Court of New York for New York County and has not proceeded to trial on its merits.

On September 29, 1941, on default of AKM, Propper was appointed permanent receiver of the New York property and assets of AKM. I specifically deny the statements contained in the affidavits of the receiver that he was "continued" as permanent receiver. His appointment, as is de-
288 scribed by §977-b (10) was an entire new and distinct appointment and had no relation to his prior appointment as temporary receiver.

On November 3, 1941, ASCAP filed its amended answer in the case of *Propper v. Taylor*, asserting that the assets held by it for AKM had been frozen by Executive Order 8389, that the plaintiff had neglected and failed to secure a license authorizing him to receive either title or posses-

sion to said assets, and alleging that the order appointing Propper as receiver was without jurisdiction and in violation of §977-b on the ground that AKM was not a corporation, that Sobotka was not a creditor thereof and that the three year period of limitations within which actions may be commenced under §977-b had elapsed prior to the commencement of the receivership action of *Sobotka* v. *AKM*. These matters have not been determined, and must be determined before final disposition of said action. I specifically deny that the appointments of Propper as temporary and permanent receiver were valid acts, within the jurisdiction of the courts of the state of New York as defined by §977-b. 289 290

Pursuant to the provisions of §977-b of the Civil Practice Act of the state of New York, receivers appointed thereunder are deemed to be in constructive possession of the property and assets of the corporation which is placed in receivership upon the date of delivery to the person, firm, or corporation holding said assets a copy of the order appointing said receiver, together with the demand therefor, which in this case occurred on July 9, 1941, and are deemed to have acquired title to said assets upon the date when the receiver's appointment is made permanent, which in this case occurred on September 29, 1941. I specifically deny and controvert the allegations contained in the answer of the defendant Propper filed herein and in the affidavits filed herein on his behalf in which it is alleged that he obtained title to the New York assets of AKM upon the date of his appointment as temporary receiver on June 12, 1941. 291

Although the said Propper, as receiver, now claims to have acquired title to the funds of AKM held by ASCAP by his appointment as temporary receiver on June 12, 1941

and before Executive Order No. 8389 became applicable to
292 the property of nationals of Austria, this contention is at complete variance with the position he has heretofore taken on this subject. On April 30, 1942 the receiver, through his attorney, by affidavits filed in the action of *Propper* v. *Taylor* now pending in the Supreme Court of New York for New York County, recognized that section 977-b of the Civil Practice Act of New York did not purport to invest him with title to the said property of AKM until his appointment was made permanent on September 29, 1941 and after the effective date of Executive Order No. 8389. Per-
293 tinent extracts from said affidavits are attached hereto, marked Exhibits "A" and "B" and by this reference made a part hereof.

Pursuant to the terms of Executive Order 8389, which became applicable to the property of nationals of Austria on June 14, 1941 and pursuant to the duly issued rules, orders and regulations issued thereunder, any and all transactions involving property in which nationals of Austria have an interest have been prohibited, unless licensed, since that date and are null and void and of no force and effect, including attempted and purported transfers of either title or possession by judicial process, and any and all such
294 transfers before that date, unless licensed, may not be the basis for the assertion of any right or interest in such property unless the person with whom such blocked account is held had written notice of the transfer before the effective date of the Order. Pursuant to the terms of 977-b of the New York Civil Practice Act, the said Propper as receiver was not deemed to have acquired title to the property of AKM until his permanent appointment on September 29, 1941 and the receiver has admitted, both by answer and

affidavit that he did not notify ASCAP, with whom the funds of AKM were held, of his purported transfer until July 9, 1941. Both of these occurrences were after the effective date of Executive Order No. 8389, and his purported and attempted transfer of title was a transaction prohibited by the terms of the Order. Because of such prohibition the receiver was prevented and prohibited from acquiring either title or possession to the funds of AKM. Pursuant to the provisions of Executive Order No. 8389, title of said funds remained in AKM and possession thereof remained in ASCAP at all times until vested by the Alien Property Custodian on September 4, 1943, as hereinafter set forth. The said Propper, receiver, has at no time had any right, title or interest therein but by his cause of action pending in the courts of the State of New York against ASCAP seeks to accomplish a transfer of title and possession forbidden and prohibited by lawful acts and regulations of the United States. 295 296

The said Henry M. Propper, receiver, has not at any time either applied for or been granted a license to engage in any transaction involving any property in which the said AKM has an interest, nor to do any other act prohibited by the terms of Executive Order No. 8389, nor has any other person acting on his behalf ever applied for or been granted a license to engage in any transaction involving any property of the said AKM. The certificate of the Division of Foreign Funds Control, Department of the Treasury, certifying these facts, is attached hereto, marked Exhibit "C" and by this reference made a part hereof. 297

At all times material hereto, ASCAP, the party with whom said account of AKM has been held, has treated said account as a blocked account, has properly refused to make

payment therefrom without license, and in its answer to
298 the action of *Propper* v. *Taylor* has specifically alleged and pleaded that said account had been frozen and blocked by the terms of Executive Order No. 8389, and that the plaintiff Propper had neglected and failed to obtain a license authorizing him to acquire title or possession to said account.

On September 4, 1943 the Alien Property Custodian, acting under authority duly delegated to him by the Trading with the Enemy Act and by Executive Order No. 9095, as amended, issued his Vesting Order No. 2097, filed with the
299 division of the Federal Register on December 4, 1943 and published in 8 Federal Register 16463 on December 7, 1943, wherein the Alien Property Custodian vested in himself all of the copyrights of AKM, all rights and claims of AKM thereunder, all contracts of AKM relating to copyrights, all moneys accrued or to accrue thereunder, and any and all causes of action relating to the foregoing. By the same Order the Custodian also vested in himself title to funds held by ASCAP for other European performing rights societies, not material to this motion. By his vesting the Custodian became sole and absolute owner of all the funds and property held by ASCAP for AKM and all rights in
300 and to the cause of action brought by this receiver to recover said funds. The determination of the Custodian that the property so held by ASCAP was the property of AKM is final and conclusive, whether right or wrong, and cannot be contested by the receiver in this proceeding or in the courts of the state of New York. The rights of the receiver, if any he has, are inferior and subordinate to the Custodian's right to be placed in immediate possession of the

funds and property vested by him, and may be asserted solely and only in a suit for return after possession has been duly surrendered to the Custodian, as is provided by sections 9(a) and 7(c) of the Trading with the Enemy Act (40 Stat. 411). A copy of Vesting Order No. 2097 is attached hereto, marked Exhibit "D" and by this reference made a part hereof. 301

On September 11, 1942, the Alien Property Custodian made written demand on ASCAP for delivery of the funds held by it and although ASCAP complied with said demand in part by delivering to the Custodian funds held by it for certain other European performing rights societies, ASCAP has not delivered to the Custodian the funds held by it for AKM, in whole or in part. The Custodian did not serve a demand upon the receiver, as is stated in the receiver's affidavit, for the reason that no demand is necessary to mature the Custodian's legal rights under his vesting orders, and in any event, the receiver has no right, title or interest in and to the funds vested. Even were a demand necessary, the requirement would have been fulfilled by service of a demand on ASCAP, the party in actual possession. 302

Public Law 322—79th Congress, by virtue of which the receiver states that the property of AKM "is not subject to any rights of the Alien Property Custodian", is not material to this action. That law provides only that vested property may be returned to its former owners if the Custodian shall find that the former owner has not been, since December 7, 1941, a citizen or subject of a nation with which the United States has been at war since December 7, 1941, that the return is in the interest of the United States, and 303

304 if certain other findings are made. No such findings have been made as to the vested property of AKM; and indeed, the Act does not apply to such property, as it applies only to property which has been surrendered and delivered to the Custodian. The Act is not, in any sense, a self-executing abandonment of vested property; it creates no rights in AKM or this receiver, and does not impair the right and duty of the Custodian to reduce the vested property of AKM to possession.

I specifically deny that the receiver's attorney has, or has ever had, any valid attorney's lien upon the funds of 305 AKM which have been vested by the Alien Property Custodian; and state that his client, the receiver, does not have, and has never had, a valid cause of action against ASCAP to recover said funds, nor has he ever had any right, title, or interest therein. He has, at all times, been prohibited by the terms of Executive Order No. 8389 from ever having any interest therein, and his attorney has no valid lien therein. Even if the receiver's attorney had a valid lien, it has not been recognized by the Vesting Order of the Custodian. The determination of the Custodian, that the funds and property vested by him are the property of AKM, and not recognizing any interest in this attorney, is final and 306 conclusive. The correctness of this determination cannot be challenged in this proceeding, but only in a suit for return as is provided by sections 9(a) and 7(c) of the Trading with the Enemy Act.

The various creditors who have filed claims in the receivership proceeding, including the receiver's attorney, as set out in the affidavits filed herein by Henry M. Propper, Morris W. Primoff, and A. Walter Socolow, are not necessary nor proper parties to this proceeding. The Alien Property

Custodian is not a creditor in the receivership action, and this action is not a dispute between creditors. The issues herein are between the Custodian and the receiver, as contesting claimants to title to the assets of AKM, and the receiver, by appearing herein, represents his alleged trust estate, and all creditors therein. It is his exclusive right and duty to represent the trust estate in all litigation, and the creditors thereof are parties to such litigation through the receiver. 307

The present action of *Propper* v. *Taylor*, now pending in the Supreme Court of New York for New York County is the sixth action brought in the courts of New York by a small group of persons, all represented by the attorney who represents the receiver herein, attempting to acquire possession of the funds held by ASCAP for AKM. The first of the actions was commenced in February, 1939, soon after Austria had succumbed to the domination of Germany, and AKM became unable to protect its interests here. The first of these actions was entitled *Primoff* v. *AKM*, and resulted in a default judgment in the sum of $989.98, acquired by service upon a former employee of AKM who had been discharged in 1938. Supplemental proceedings were then instituted against ASCAP (*Primoff* v. *AKM and Gene Buck, as president of ASCAP*, 2457/1940) in which ASCAP answered, asserting the invalidity of the default judgment, and the case has not been further prosecuted. The case of *Leo Ascher, Herman Leopoldi, Franz Sobotka and Ladislas Synes* v. *AKM* (6924/1940) also resulted in default judgment against AKM, in the sum of $89,739.03. Supplementary proceedings were again commenced against ASCAP (*Ascher et al.* v. *Buck*) defendant's motion for summary judgment, attacking the default judgment on jurisdictional 308 309

grounds, was sustained, and the action dismissed. The re-
310 ceivership action of *Sobotka* v. *AKM* and the action of *Propper* v. *Taylor* are still pending. It is the public policy and foreign policy of the United States, as expressed by Executive Order No. 8389 and the Trading with the Enemy Act, to vest title to enemy and foreign property in the United States or, by freezing, to protect it for ultimate return to its rightful owners. The present actions by this small group of creditors and ex-members of AKM, seeking to acquire title to all of the assets of AKM to the exclusion of the United States and all other creditors and members
311 of AKM, collides with and subtracts from the policies of the United States, as expressed by lawful acts and orders thereof, and must yield thereto.

The jurisdiction of this court to determine and adjudicate the lack of interest of the said Propper, receiver, in and to the property of AKM which is the subject of this action is secured by section 24(1) of the Judicial Code and by section 17 of the Trading with the Enemy Act. Since the issuance of Vesting Order No. 2097 on September 4, 1943, ASCAP has delivered to the Custodian large sums of money which it has collected for foreign performing rights societies, and which had been vested by Vesting Order No.
312 2097, but at all times has refused to deliver to the Custodian the money collected by it for AKM, on the ground that this receiver had subjected it to suit to recover the same funds. For a period of almost three years the continued action of this receiver has prevented the United States from being placed in possession of its property, which was vested for the purpose of enabling the United States to more effectively wage war against its enemies. The Alien Property Custodian is entitled to immediate possession of the prop-

erty he has vested; the said Propper, receiver, has no right, title or interest therein and further continuance of his "action against ASCAP in the courts of the State of New York will serve only to harass the defendant ASCAP and to subject it to two actions and possibly to two judgments for the same property and will impede, delay, and impair the ability of the United States to effectuate its powers to wage war and to conduct foreign affairs. The Custodian is not a party to the state receivership action of *Sobotka* v. *AKM*, nor to the state court action of *Propper* v. *Taylor*, and in the latter case the Appellate Division has held that the state court "had no jurisdiction of the Alien Property Custodian and no power to make any adjudication affecting his title to the cause of action." (*Propper* v. *Taylor*, Appellate Div., 1st Dept., April 19, 1946.) This court alone has jurisdiction of all the parties and the subject matter. The jurisdiction of this court is invoked to terminate the harassment and interference caused by the receiver, and the decision of this court, when entered, will be final and binding on all parties and will control further proceedings brought by the defendant Propper in the courts of the state.

313

314

/s/ JAMES D. HILL

315

(Sworn to June 19, 1946.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF JAMES D. HILL

316

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Supreme Term Part I

Papers Submitted
April 24, 1942
Numbered 4.

317

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

GENE BUCK, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

318

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says: I am the attorney for the plaintiff in the above entitled action. * * *

The plaintiff was appointed Temporary Receiver, pursuant to Section 977-b of the Civil Practice Act which au-

thorizes the appointment of a receiver when a foreign corporation has been dissolved, liquidated or nationalized and has assets or property of any kind within this State. Subdivision 19 of said section as amended by Laws of 1941, Chapter 926, May 1, provides, among other things, that the liquidation or dissolution of such corporation in the country of its domicile or any confiscatory law or decree thereof has no extraterritorial effect or validity as to property or choses in action within the State or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in this State. The action in which plaintiff was appointed Temporary Receiver resulted in a final judgment appointing plaintiff Permanent Receiver and establishing the fact of the liquidation and dissolution of AKM (on which the jurisdiction of the Court to make said judgment was based under Section 977-b of the Civil Practice Act). Said judgment also establishes the title of the plaintiff as such receiver to the assets of AKM, including the amounts here sued for, free from any effect of such dissolution and liquidation of AKM in the country of its domicile or any confiscatory law or decree thereof as provided in Subdivision 19 of said Section 977-b. * * *

319 320 321

(S) A. Walter Socolow

Sworn to before me this
20th day of April, 1942.

(S) Ruth Steigman
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission expires March 30, 1943.

EXHIBIT B ANNEXED TO AFFIDAVIT OF JAMES D. HILL

322 SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Supreme Term Part

Papers Submitted
April 24, 1942
Numbered 18.

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323 HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

GENE BUCK, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

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324 STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes and says:

* * * * *

Moreover, the record of this Court show that the action in which plaintiff was appointed Temporary Receiver resulted in a final judgment appointing plaintiff Permanent Receiver and establishing the fact of the liquidation and dissolution of AKM (on which the jurisdiction of the Court to make said judgment was based under Section 977-b of the Civil Practice Act). Said judgment also established the title of the plaintiff as such Receiver to the assets of AKM, including the amounts here sued for, free from any effect of such dissolution and liquidation of AKM in the country of its domicile or any confiscatory law or decree thereof, as provided in subdivision 19 of said Section 977-b. 325 326

(S) A. Walter Socolow

Sworn to before me this
20th day of April, 1942.

(S) Ruth Steigman
Notary Public, New York County
N. Y. Co. Clk's No. 349 Reg. No. 38767
Commission expires March 30, 1943.

327

EXHIBIT C ANNEXED TO AFFIDAVIT OF JAMES D. HILL

328 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 35-581

JAMES E. MARKHAM,
Alien Property Custodian,

Plaintiff,

—v.—

329 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an Unincorporated Association of more than seven members,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York, of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendants.

330 Pursuant to Rule 44(b) of the Rules of Civil Procedure, I, Edward W. O'Flaherty, state that I am Special Assistant to the Director and Executive Officer of Foreign Funds Control, Treasury Department, Washington, D. C., and as such have custody of the records and files of Foreign Funds Control and that I have caused diligent search to be made of the records and files of Foreign Funds Control and have found no record that either Franz Sobotka or Henry M. Propper, receiver, has, at any time, applied for or been

Exhibit C Annexed to Affidavit of James D. Hill

granted a license to engage in any transaction involving any property in which Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., has any interest, or that either of them applied for or has been granted a license to engage in any transaction involving the property of any foreign national, or to do any other act prohibited by the terms of Executive Order No. 8389, as amended, or that any other person, firm, corporation, or judicial officer ever applied for or has been granted a license to engage in any transaction involving any property of the said A. K. M.

331

June 12, 1946

332

(s) EDWARD W. O'FLAHERTY

June 12, 1946

I, F. A. Birgfeld, Chief Clerk of the Treasury Department, Washington, D. C., certify that Edward W. O'Flaherty, Special Assistant to the Director and Executive Officer of Foreign Funds Control, Treasury Department, Washington, D. C., has custody of the records and files of Foreign Funds Control.

333

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

SEAL

By direction of the Secretary of the Treasury:

/s/ F. A. BIRGFELD
Chief Clerk, Treasury Department.

EXHIBIT D ANNEXED TO AFFIDAVIT OF JAMES D. HILL

334

UNITED STATES OF AMERICA

OFFICE OF ALIEN PROPERTY CUSTODIAN

Vesting Order Number 2097

Re: Certain rights under copyrights in which interests are held by foreign nationals

Under the authority of the trading with the enemy Act, as amended, and Executive Order No. 9095, as amended, and pursuant to law, the undersigned, after investigation:

335

1. Finding that each organization listed in Exhibit A attached hereto and by reference made a part hereof is organized under the laws of, and has its principal place of business in, and is a national of, the foreign country appearing after its respective name;

2. Finding that the members of the organizations listed in the said Exhibit A are residents of and therefore are nationals of foreign countries;

3. Finding that the property described in subparagraph 4 hereof is property of the organizations to which

336

reference is made in said Exhibit A and/or each and every member thereof;

4. Determining that the property described as follows: All right, title, interest and claim of whatsoever kind or nature, under the statutory and common law of the United States and of the several States thereof, of the organizations to which reference is made in said Exhibit A, and/or each and every member thereof, in, to, and under the following:

Exhibit D Annexed to Affidavit of James D. Hill

a. Every right under copyright, claim of copyright or right to copyright in and for the non-dramatic performance for profit of any and all musical compositions in which such rights are held by the organizations to which reference is made in said Exhibit A and every member thereof, 337

b. Every license, agreement, privilege, power and right of whatsoever nature arising under or with respect to any or all of the foregoing; excepting the rights of any person to renew any or all of the copyrights arising in, from or under any or all of the foregoing, 338

c. All monies and amounts, and all right to receive monies and amounts, by way of royalty, share of profits or other emolument, accrued or to accrue, whether arising pursuant to law, contract or otherwise, with respect to any or all of the foregoing,

d. All rights of reversion or revesting, if any, in any or all of the foregoing,

e. All causes of action accrued or to accrue at law or in equity with respect to any or all of the foregoing, including but not limited to the right to sue for and recover all damages and profits and to ask and receive any and all remedies provided by common law or statute for the infringement of any copyright or the violation of any right or the breach of any obligation described in or affecting any or all of the foregoing, 339

is property payable or held with respect to copyrights, or rights related thereto, in which interests are held

by, and such property constitutes interests held therein
340 by nationals of foreign countries,

5. Having made all determinations and taken all action, after appropriate consultation and certification, required by said Executive Order or Act or otherwise; and

6. Deeming it necessary in the national interest;

hereby vests in the Alien Property Custodian the property hereinbefore described in subparagraph 4, to be held, used,
341 administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States;

Such property, and any or all of the proceeds thereof, shall be held in an appropriate special account or accounts, pending further determination of the Alien Property Custodian. This shall not be deemed to limit the powers of the Alien Property Custodian to return such property or the proceeds thereof, or to indicate that compensation will not be paid in lieu thereof, if and when it should be determined that such return should be made or such compensation should be paid.

342 Any person, except a national of a designated enemy country, asserting any claim arising as a result of this order may file with the Alien Property Custodian a notice of his claim, together with a request for a hearing thereon, on Form APC-1, within one year from the date hereof, or within such further time as may be allowed by the Alien Property Custodian. Nothing herein contained shall be deemed to constitute an admission of the existence, validity or right to allowance of any such claim.

Exhibit D Annexed to Affidavit of James D. Hill

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in Section 10 of said Executive Order. 343

Executed at Washington, D. C. on September 4, 1943.

(Official seal)

(Signed) LEO T. CROWLEY

LEO T. CROWLEY
Alien Property Custodian

[F. R. Doc. 43-19387; Filed, December 4, 1943; 11:04 a. m.]
[8 Fed. Reg. 16463 (December 7, 1943)] 344

345

Exhibit D Annexed to Affidavit of James D. Hill

EXHIBIT A

	Name of organization	Last known principal place of business
346	Staatlich Genehmigte Gesellschaft Der Autoren, Komponisten Und Musikverleger (AKM)	Vienna, Austria
	Association Coop. Bulgare Pour La Protection Des Droits D'Auteur (AVTOR)	Sofia, Bulgaria
	Ochranne Sdruzeni Autorske (OSA)	Praha, Czecho Slovakia
347	Internationalt Forbund Til Beskyttelse Af Komponistrettigheder I Danmark (KODA)	Copenhagen, Denmark
	La Societe des Auteurs Compositeurs et Editeurs de Musique (SACEM)	Paris, France
	Staatlich Genehmigte Gesellschaft Zur Verwertung Musikalischer Urheberrechte (STAGMA)	Berlin, Germany
348	Magyar Szovegirok, Zeneszerzok Es Zenemukiadok Szovetkezete (MARS)	Budapest, Hungary
	Societa Italiana Degli Autori Ed Editori (SIAE)	Rome, Italy
	Ente Italiano Per Il Diritto Di Autore (EIDA)	Rome, Italy
	Udruzenje Jugoslovenskih Muzickih Autora (UJMA)	Zagreb, Jugoslavia
	Societatea Compozitorilor Romani (SOCORO)	Bucarest, Rumania

Affidavit of Herbert P. Jacoby

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action—File No. 35-581

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

HERBERT P. JACOBY, being duly sworn, deposes and says:

I am a member of the firm of Schwartz & Frohlich, attorneys for defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP).

This affidavit is submitted in connection with the motion of defendant Henry M. Propper, as Receiver of the property and assets within the State of New York of an Austrian organization commonly known as A. K. M. wherein said defendant seeks an order pursuant to Rule 12, subdivision c for judgment on the pleadings with respect to the second count in the complaint or in the alternative, for an order pursuant to Rule 56 granting him summary judgment with respect thereto.

While no affirmative relief is sought in said application as against defendant ASCAP that defendant has a vital interest in the disposition thereof. Accordingly, this affidavit is submitted for the purpose of setting forth defendant ASCAP's position on this motion.

Defendant ASCAP is an unincorporated association created under and pursuant to the laws of the State of New York and engaged in the business of exploiting the public performing rights in and to the musical compositions composed, published or copyrighted by its members. On January 1, 1933 this defendant entered into a written contract with an Austrian organization commonly known as A. K. M. which had been organized for the purpose of protecting the performing rights to Austrian musical works. Under that contract ASCAP granted to A. K. M. the exclusive right to license the public performing rights of the music in its repertoire in Austria and A. K. M. reciprocally granted to ASCAP similar rights in its catalogue of musical compositions for the territory of the United States. Each of the parties agreed to account to the other on the basis of a formula set forth in the contract.

In June, 1941, one Franz Sobotka, a former member of A. K. M. brought a proceeding in the Supreme Court of the State of New York under and pursuant to Section 977-b of the Civil Practice Act for the purpose of obtaining the appointment of a Receiver of the property of A. K. M. within the State of New York. His petition alleged that A. K. M. had been dissolved, liquidated or nationalized and that there were assets within the State of New York belonging to A. K. M. or its membership. On June 12, 1941 an ex parte order was entered appointing defendant Henry M. Propper as temporary Receiver.

On July 9, 1941 defendant Propper caused to be served upon defendant ASCAP a written demand to pay over to him in his capacity as temporary Receiver of A. K. M. any and all moneys due and payable from ASCAP to A. K. M. under the agreement of January 1, 1933. Since it claimed

and still claims to owe nothing to A. K. M.; defendant ignored the aforementioned demand. 355

Thereafter and on July 29, 1941 defendant Propper instituted an independent action in the Supreme Court of New York County against defendant ASCAP in which he sought to recover the sum of One Hundred Fifty Thousand ($150,000) Dollars for the alleged breach by defendant ASCAP of the aforementioned contract of January 1, 1933. At that time the proceeding for the appointment of a Receiver was still pending. Some time thereafter A. K. M. defaulted in the receivership proceeding instituted by Sobotka and a final judgment was entered against it on September 29, 1941 under which defendant Propper was appointed permanent Receiver of its assets within the State of New York. No attempt however was ever made to substitute the permanent Receiver for the temporary Receiver in the action which had been brought against defendant ASCAP. 356

Shortly after issue was drawn in the action brought by Propper in his capacity as temporary Receiver against defendant ASCAP, the war in Europe broke out. On April 11, 1942 defendant ASCAP sought an order staying Propper from the further prosecution of his action until three months after the termination of the state of war then existing between the United States and Germany. That application was granted by order dated May 16, 1942 which was subsequently affirmed by the Appellate Division on February 6, 1943 (*Propper* v. *Taylor*, 265 App. Div. 1040). 357

While the aforementioned stay was in force and effect, the United States Alien Property Custodian by order dated September 4, 1943, and acting under the authority of the Trading with the Enemy Act and Executive Order 9095,

358 purported to seize all of the property of A. K. M. in the United States, as well as the property of a number of other European Performing Rights Societies. The order issued on that date is known as Vesting Order 2097 and a copy thereof is annexed to the complaint herein. Shortly thereafter the Alien Property Custodian made written demand upon defendant ASCAP to turn over to him any and all property belonging to defendant A. K. M.

By reason of the pendency of the action brought by defendant Propper in the Supreme Court, New York County, which related to the identical subject matter as that contained in the demand of the Alien Property Custodian, de-
359 fendant ASCAP found itself confronted with two conflicting claims. Since it denied any obligation whatsoever to A. K. M., it was unable to extricate itself from this unenviable position by paying a sum of money into court and interpleading the conflicting claimants.

Taking the position that by virtue of Vesting Order 2097 the Alien Property Custodian had become entitled to possession of any property in the United States belonging to or claimed by or on behalf of A. K. M., defendant made a motion for summary judgment in the State Court action instituted by defendant Propper. That application was
360 disposed of in an opinion written by Mr. Justice Walter which is reported in 186 Misc. 70.

In effect Mr. Justice Walter held that even though title to the subject matter of the State Court action had become vested in the Alien Property Custodian, defendant ASCAP was not entitled to summary judgment by reason of the fact that, under Section 83 of the Civil Practice Act, the action might be continued by the original party plaintiff, unless the court directed the person to whom interest had

been transfefred *pendente lite* to be substituted in the action or joined as a co-plaintiff. Accordingly, defendant 361
ASCAP's motion for summary judgment in the State Court action was denied, without prejudice to an application to bring in the Alien Property Custodian as a party plaintiff.

Thereupon, defendant ASCAP made a motion, pursuant to Sections 83 and 210 of the Civil Practice Act, to substitute the Alien Property Custodian as party plaintiff in the State Court action in place and instead of defendant Propper. Notice of that application was given to the Alien Property Custodian and he appeared specially for the purpose of contesting the Court's jurisdiction over him. That 362
motion was likewise decided by Mr. Justice Walter in a written opinion which is reported in 186 Misc. 72.

In his second opinion Mr. Justice Walter denied the motion for substitution and in lieu thereof directed that "unless the Custodian shall voluntarily procure himself to be made co-plaintiff in this action" within a specified period of time "he will be barred and foreclosed of any and all right, title and interest in the subject matter of this action". An appeal was then taken by both the Alien Property Custodian and the defendant ASCAP to the Appellate Division which on April 18, 1946 reversed the ruling of Mr. 363
Justice Walter on the ground that the State Court had no jurisdiction over the Alien Property Custodian and could make no order affecting his title to the property of A. K. M. in the United States.

A few days thereafter the Alien Property Custodian instituted this action wherein he named both ASCAP and Propper as parties defendant. In the second count of his complaint he seeks a money judgment against defendant

364 ASCAP and also a declaration that defendant Propper has no interest in any such recovery.

Defendant Propper has interposed an answer in which he asserts a number of affirmative defenses all directed to the second count of the instant complaint which is the only one in which he has any interest. The first of those defenses alleges that the complaint against him does not state facts sufficient to constitute a cause of action; the second alleges that the court has no jurisdiction over the action; the third alleges that all property of A. K. M. has become irrevocably vested in defendant Propper; the fourth alleges that certain persons who have filed claims in the
365 receivership proceeding are not made parties to this action; and the fifth alleges that the attorneys who appear in the receivership proceeding and in the State Court action brought by Propper against defendant ASCAP and each of whom may have an attorney's lien have not been made parties to this action. The instant motion for judgment on the pleadings or for summary judgment is made in support of those defenses.

Defendant ASCAP has no direct interest in the disposition of defendant Propper's application except insofar as the jurisdiction of this Court to entertain and to ultimately
366 dispose of this action on the merits may be concerned. In fact it is submitted that this Court is the only Court that has jurisdiction over all necessary parties and is the only Court which can render an adjudication on the merits. Both defendant ASCAP and defendant Propper are subject to the jurisdiction of this Court since they are residents of this District. Plaintiff, the Alien Property Custodian has chosen this Court as a forum and thereby has voluntarily submitted himself to its jurisdiction.

The Appellate Division has held that the courts of the State of New York have no jurisdiction over the Alien Property Custodian and can enter no order which can in any way determine his rights with respect to the matter in controversy. Therefore, if defendant ASCAP is to receive any relief from the conflicting claims which have been asserted against it by the plaintiff and by the defendant Propper, it is essential that such relief be afforded by this Court, since *no other Court* has jurisdiction over *all parties* concerned. 367

The claim asserted in the answer of defendant Propper that creditors who have filed claims with him are not made parties to this action and that therefore, there is a defect of parties defendant is wholly without merit. Such creditors are not necessary parties to this action. Their interests, if any, are represented by defendant Propper. Moreover, under the Trading with the Enemy Act all such creditors have the right to file claims with the Alien Property Custodian and to obtain ultimate payment thereof, in the event that the action produces a fund out of which they can be paid. 368

In connection with this defense it is pertinent to note that none of the creditors referred to in the moving papers have been made parties to the State Court action against defendant ASCAP. Certainly, if their interest is sufficient to make them proper parties to an action brought against defendant ASCAP, defendant Propper himself has not recognized that fact. 369

Similarly without merit, is the defense regarding the necessity of joining the attorneys in the receivership proceeding and in the State Court action against defendant ASCAP as parties defendant in this action. They, too,

have the right under the Trading with the Enemy Act to
370 file their claims with the Alien Property Custodian. Moreover, if they or either of them has rendered any actual service in producing a fund for payment of creditors of A. K. M., this Court may make adequate provision for their protection in the final judgment that may be entered herein. There is no necessity that they be made parties defendant to this action for that purpose.

Finally, there is no basis for the claim that the second count of the instant complaint fails to allege a cause of action against defendant Propper. The procedure which the Alien Property Custodian has adopted is fully sus-
371 tained by the recent decision of the Supreme Court of the United States in *Markham* v. *Allen*, 90 L. Ed. 254.

Thus, defendant Propper's application necessarily turns upon the third affirmative defense alleged in his answer wherein the claim is made that he is irrevocably vested with title superior to that of the Alien Property Custodian. On that phase of the case it is unnecessary for defendant ASCAP to take any position at this time, other than to urge that that question be judicially determined, either on this application or after trial.

In this connection it should be pointed out that in order
372 for defendant Propper to succeed he must establish (1) that he was validly appointed as temporary Receiver of A. K. M.; (2) that the "freezing" regulations in effect on July 9, 1941 (when his original demand was served upon defendant ASCAP) do not bar the maintenance of his State Court action; and (3) that Vesting Order 2097 was ineffectual to divest any interest which he may have in the subject matter of that action. Defendant ASCAP always has strongly urged the negative side of all three of the foregoing provisions. It does so at this time.

While defendant ASCAP has consistently maintained that the position asserted by the Alien Property Custodian is the correct one it will at this time leave to the Alien Property Custodian the presentation of the legal basis therefor. Its chief concern presently is that this Court retain jurisdiction of this action for the purpose of making a final determination on the merits. It is submitted that for the reasons hereinabove set forth every effort should be made to protect defendant ASCAP from the conflicting claims which have been asserted against it by plaintiff and by defendant Propper and that this is the only Court which has jurisdiction to do so. 373 374

WHEREFORE, it is respectfully prayed that to the extent that the application of defendant Propper for judgment on the pleadings or in the alternative for summary judgment seeks to attack the jurisdiction of this Court the same should be in all respects denied and that jurisdiction should be retained for the purpose of making a final determination upon the merits either upon this application or upon an ultimate trial.

HERBERT P. JACOBY

(Sworn to June 13, 1946.) 375

Affidavit of A. Walter Socolow

376 DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK;
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

A. WALTER SOCOLOW, being duly sworn, deposes
377 and says:

I am the attorney for Henry M. Propper, as Temporary and Permanent Receiver and the defendant in the above entitled action.

This affidavit is submitted in opposition to the motion of the plaintiff Alien Property Custodian for judgment on the pleadings or summary judgment against the said defendant Receiver. It is stipulated and agreed that said motion for judgment on the pleadings or summary judgment be heard, considered and determined "in conjunction with the motion for judgment on the pleadings or summary judg-
378 ment heretofore filed by defendant Henry M. Propper, receiver, dated May 28, 1946." Accordingly, I respectfully refer to, and by such reference incorporate as a part of this affidavit with the same force and effect as if they were hereto annexed, all the papers and exhibits submitted on Mr. Propper's motion for judgment on the pleadings or summary judgment dismissing the complaint, including the answer of Mr. Propper and the exhibits thereto annexed.

The facts herein are all admitted and based solely upon documentary proofs of record, all undisputed, and, therefore, this affidavit will be confined solely to the following headings: 379

1. *The Public and Foreign Policy of the United States.*

At the top of page 9 of his affidavit, Mr. Hill states:

> "It is the public policy and foreign policy of the United States, as expressed by Executive Order No. 8389 and the Trading with the Enemy Act, to vest title to enemy and foreign property in the United States or by freezing, *to protect it for ultimate return to its original owners.*" 380

That is not the public policy and foreign policy of the United States. It has never been and it is not the policy of the United States to protect foreign nationals, some of whom were our enemies, as against the creditors of such nationals who are citizens of the United States. The public and foreign policy of the United States, as expressed in Order No. 8389 and the Trading with the Enemy Act, as shown by the authorities, has been repeatedly expressed by the Executive and Congress, and certainly by our courts, to be to prevent local property of foreign nationals from falling into the hands of our enemies or potential enemies, *and to protect American creditors who may have claims against such property.* Indeed, the regulations under Order No. 8389 expressly provide: 381

> "(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any

382 action or proceeding in any Court within the United States shall be, so far as affected by the Order and/or this general ruling, *valid and enforceable* for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; provided, however, that no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license."

383 It is clear from the foregoing that nothing in the Order No. 8389, or the regulations thereunder, in any way conflicts with the statutes and public policy of the State of New York under Section 977-b. In fact, the regulations expressly affirm the provisions of 977-b and the policy of the State thereunder.

II. *Title and Rights of Defendant Receiver Under Section 977-B.*

384 At the middle of page 2 of his affidavit, Mr. Hill, referring to the order appointing Mr. Propper Temporary Receiver on *June 12, 1941*—prior to the War and even prior to Executive Order No. 8389—states:

> "Said order did not purport to invest said Temporary Receiver with title to said assets."

A copy of the order, annexed to the answer of the defendant Receiver, is before the Court in its entirety. There is

no question about its being a true, correct and complete copy. Its provisions and interpretation are for the Court. Suffice it to say that said order on its face shows that it was made pursuant to Section 977-b. 385

Referring to Section 977-b, Mr. Hill, at the foot of page 3 of his affidavit, states that "receivers appointed thereunder are deemed to be in constructive possession of the property and assets of the corporation * * * and are deemed to have acquired title to said assets upon the date when the receiver's appointment is made permanent, which in this case occurred on September 29, 1941".

That conclusion is belied by the express provisions of Section 977-b. Subdivision 4 of said Section provides "for the appointment of a temporary receiver pending the determination of the action" whom "the Court *must* thereupon appoint" and who "shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible or intangible, in the State of New York of said foreign corporation and hold the same until the further order of the Court." 386

Subdivision 19 of said Section 977-b expressly provides that "*title to* all assets, credits, *choses in action* and property, tangible and intangible, of any kind and every kind whatsoever * * * *shall immediately vest* in the receiver *upon the making of the order appointing him.*" Thus, by the express terms of the statute, title vested immediately in the Receiver "*upon the making of the order*" (not from the judgment thereafter entered). 387

In fact, Section 12 of said Section expressly provides:

> "*Any receiver* appointed *pursuant to this section* shall have all the powers and duties, in addition to

388 those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the State of New York."

"Any receiver" includes a temporary receiver provided for in Subdivision 4 thereof.

III. *The Only Determination and the Only Rights Acquired by Plaintiff Custodian Are Set Forth in Order #2097.*

389 Near the top of page 6 of his affidavit, Mr. Hill refers to the vesting order "wherein the Alien Property Custodian vested in himself all the copyrights of AKM, all rights and claims of AKM therein, all contracts of AKM relating to copyrights, and moneys accrued or to accrue thereunder and any and all causes of action relating to the foregoing".

This is a distortion of the Custodian's order No. 2097, a copy of which is annexed to Mr. Hill's affidavit. The vesting and determining part of that order appears in paragraph 4 thereof. That paragraph shows by its very terms that the order is limited "to all right, title and interest and claim of whatsoever action or nature under the statutory or common law of the United States and of the several 390 states thereof" which the European societies therein referred to had on the date of the order "in, to and under" the items enumerated "a" to "e" therein.

In other words, the Custodian's determination and vesting here did not extend to any specific copyrights, contracts, etc., but was limited "to all right, title and interest and claim" which the foreign nationals *then had* "in, to and under" such copyrights, contracts, etc.

This acknowledges that the only determination and vesting made by the Custodian's order so far as the subject of Count 2 is concerned, is expressly limited to the balance remaining in the hands of the defendant Receiver upon distribution under Section 977-b. For this the only remedy of the Custodian under the authorities is to proceed by filing a claim with the Receiver. 391

IV. *The Rights of Creditors Who Filed Claims Against the Receiver and the Liens of the Receiver's Attorneys:*

A position is here boldly taken on behalf of plaintiff Custodian that the various creditors who filed claims with defendant Receiver, as well as the Receiver's attorneys, have no rights whatsoever. Nevertheless, they are all denied even the right of a day in Court. It is asserted near the top of page 8 of Mr. Hill's affidavit that these various creditors and claimants who filed claims with the Receiver, and the attorney for the defendant Receiver, "are not necessary nor proper parties to this proceeding". Suffice it to say such a conclusion is in direct variance with the decision of the Supreme Court of the United States in *United States* v. *Bank of New York & Trust Company*, 296 U. S. 463, 480-481. 392 393

V. *An Astounding Assertion in the Custodian's Moving Papers.*

Near the foot of page 9 of his affidavit, Mr. Hill makes the following assertion:

"For a period of almost three years the continued action of this receiver has prevented the United States

394 from being placed in possession of its property which was vested for the purpose of enabling the United States to more effectively wage war against its enemies."

This receiver was first appointed as early as June 12, 1941, long prior to World War II, and even prior to Executive Order No. 8389. Plaintiff Custodian did not commence to function until long afterwards and did not issue the alleged vesting order in question until September 4, 1943, which he filed on December 4, 1943—*more than two and one-half years ago.* Nevertheless, all that this Custodian did
395 under that vesting order was to serve a demand upon ASCAP—nothing else. Admittedly, no demand was served by the Custodian upon defendant Receiver. The only excuse offered is that no such demand was necessary. That, of course is for the Court to say, but the fact is that the failure to serve a demand belies any lack of knowledge as to the status of the receivership. No such lack of knowledge is asserted. In any event, nothing was done until the institution of this action by the Custodian on April 22, 1946.

Indeed, the reason for this inaction on the part of the Custodian is because the Custodian himself by the very
396 terms of his vesting order has recognized the validity of the status of Mr. Propper as receiver and his title to the cause of action pleaded in Count 2.

VI. *The Trial in the State Court Is Imminent.*

At the foot of page 3 of his affidavit, Mr. Jacoby, one of the attorneys for defendant ASCAP, refers to the stay of defendant Receiver's action against ASCAP until three months after the termination of the state of war then exist-

ing between the United States and Germany, which was obtained on the pretense of the necessity for securing evi- 397
dence from abroad in order to defend said action. Mr. Jacoby, however, fails to inform the Court of the reason for that stay, and further fails to disclose *that the stay has since January, 1946 been vacated and the case restored to the February, 1946 calendar for trial. The order vacating the stay was unanimously affirmed by the Appellate Division* (Propper v. Taylor, App. Div., 1st Dept., April 16, 1946); and the trial of this action has since been and is from time to time adjourned because of the pendency of this action.

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VII. *The Proceedings Which Resulted in This Action.*

In an effort to frustrate and avoid a trial of the Receiver's action against it in the State Court, ASCAP first made a motion for summary judgment based on Order #2097 of the Alien Property Custodian. That motion having been denied, ASCAP made a motion to substitute the Alien Property Custodian as plaintiff in the action instead of the defendant Receiver. *Notice to the Alien Property Custodian of such motion was given by mail.* The Alien Property Custodian appeared specially on that motion and 399
objected to the jurisdiction urging *as the ground that no proper service was made.* A copy of the Custodian's special appearance and affidavits in opposition to said motion is hereto annexed and made part hereof and marked "Exhibit A".

Referring to ASCAP's motion for summary judgment, Mr. Jacoby, at the foot of page 4 and top of page 5 of his affidavit, says:

"In effect Mr. Justice Walter held that even though
400 title to the *subject matter of the State Court action had become vested in the Alien Property Custodian*, defendant ASCAP was not entitled to summary judgment by reason of the fact that, under Section 83 of the Civil Practice Act," * * *

Let Mr. Justice Walter himself answer. He says (186 Misc. 72):

"What I wrote in connection with the denial seems to have been interpreted by the parties as a holding
401 that the cause of action has vested in the Custodian, but I certainly had no thought of making any definitive ruling on that point. Even if my language were susceptible of such interpretation it would be purely dictum because that point was not necessarily involved in a disposition of the motion.

"* * *" The request for his substitution is therefore denied."

Mr. Justice Walter further said:

"On the contrary, without attempting any definite
402 determination as to the effect of the order by which the Alien Property Custodian has sought to vest this cause of action in himself, I think it is at least safe to say that if the Custodian takes the cause of action at all, *he must take it in the plight and condition in which it was when he attempted to take it; and as applied to this case that means that he takes it as one upon which a suit already had been brought in this court and in*

which rights by way of an attorney's lien and possibly otherwise have been acquired by the institution of the action." 403

Referring to Custodian's special appearance and opposition, Mr. Justice Walter said:

"But though the Custodian's official position affords no reason why he should not be joined as a plaintiff, *there may be some substance to his objection that he cannot be brought in upon a mere notice of motion served upon him in Washington* (see Matter of Matheson's Estate, 265 N. Y. 81, 86, 87, 191 N. E. 842, 844, 845), and for that reason I think that instead of granting the motion directly the preferable practice is to adopt the procedure frequently resorted to to compel the United States and the State of New York to come in and assert any claim they have or be barred from ever asserting any claim. See cases cited in Matter of De Rario, Inc., 182 Misc. 427, 429, 43 N. Y. S. 2d 918, 920. 404

"The motion is accordingly granted to the extent only of directing that unless the Custodian shall voluntarily procure himself to be made a co-plaintiff in this action within sixty days after service upon him of a copy of the order hereon with notice of entry thereof, he will be barred and foreclosed of any and all right, title or interest in the subject matter of this action." 405

The order rendered on said decision was modified upon appeal by eliminating the provision directing the Alien Property Custodian to join as co-plaintiff and as modified

was affirmed. (Propper v. Taylor, App. Div., 1st Dept., April 16, 1946).

406

It is clear that the Appellate Division affirmed the denial of the motion to substitute and eliminated the provision as to the Alien Property Custodian joining as co-plaintiff because of the Custodian's objection to the propriety of *the service by ASCAP of the moving papers upon Custodian.* It should be noted that it was on the *same day* that the Appellate Division unanimously affirmed the order vacating the stay and restoring the case to the trial calendar and permitting the Receiver forthwith to proceed with the trial in his action against ASCAP. Immediately, and on

407

April 22, this action was commenced.

VIII. *Unwarranted Conclusions in Mr. Hill's Affidavit.*

At the middle of page 4 of his affidavit, Mr. Hill makes the assertion that the attorney for the defendant Receiver has heretofor recognized that title did not vest in the Receiver until after judgment in the Sobotka action, and seeks to bolster that assertion by attaching extracts from but two affidavits used in the action by this defendant Receiver against ASCAP. An examination of these affidavits, however, does not bear out that contention. All that is

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stated in these extracts is that the judgment in the Sobotka action "*also* establishes the title of the plaintiff as such receiver". The word "also" cannot be deemed a word of limitation; it confirms the earlier vesting of title. In fact, scores of affidavits used in the action by the defendant Receiver against ASCAP since the very outset asserted consistently that title vested in the Receiver from the date of his appointment as temporary receiver on June 12, 1941. The very complaint in the action by this defendant Receiver against

ASCAP, and served as early as July 29, 1941, was predicated upon express allegations that title "vested in the plaintiff as such temporary receiver immediately upon the making of the order appointing him as such temporary receiver". 409

At the top of page 3 of his affidavit, Mr. Hill states that Mr. Propper was not "continued" as permanent receiver but that his appointment as permanent receiver under the final judgment in the Sobotka action "was an entirely new and distinct appointment". There is no question here that the order appointing a temporary receiver and the final judgment making Propper a permanent receiver were all proceedings in one and the same action rendered in regular course. The effect of the final judgment in subdivision 10 of Section 977-b shows the continuance of the receiver appointed at the commencement of the action. 410

At page 1 of his affidavit Mr. Hill purports to characterize AKM, the Austrian corporation, as an "unincorporated association". He has, however, contradicted this baseless remark not only the allegations of the Custodian's Count 2 but by his own statements at the foot of page 1 of his affidavit where he refers to AKM as "a registered corporative society *with limited liability, organized and existing under the laws of the Republic of Austria*, and being constituted for a similar purpose". The decision of the Appellate Division (263 App. Div. 948) is conclusive and entitled to full faith and credit here. 411

Beginning at the foot of page 9 and continuing at the top of page 10 of his affidavit, Mr. Hill, attorney for the Custodian, states:

> "Further continuance of his (Receiver's) action against ASCAP in the courts of the State of New

York will serve only to harass the defendant ASCAP
412 and to subject it to two actions and possibly to two judgments for the same property and will impede, delay, and impair the ability of the United States to effectuate its powers to wage war and to conduct foreign affairs."

Such an assertion is not in good grace and is certainly unwarranted and unjustified by a governmental official. Plaintiff for three years during the war has made no move whatsoever with respect to the subject of this action, and has only now become aware that there is no war between
413 the United States and Austria. He stoops to ASCAP's tactics to delay the trial in the action against ASCAP. It is obvious that the Custodian and his attorneys are concerned only about the possibility of two judgments against ASCAP and "the ultimate return to the original owners". The Custodian is not in the least interested in giving full faith and credit to the statutes and judicial proceedings of the State of New York or the interests and vested rights acquired thereunder by American citizens who pay the taxes out of which the salaries of his office are paid.

WHEREFORE, I respectfully pray that the motion of
414 the defendant Receiver for judgment on the pleadings or for summary judgment dismissing the complaint, be, in all respects, granted, and that the cross motion of the Custodian for judgment on the pleadings or summary judgment against the defendant Receiver be denied.

A. WALTER SOCOLOW

(Sworn to June 27, 1946.)

EXHIBIT A ANNEXED TO AFFIDAVIT OF A. WALTER SOCOLOW

THE SUPREME COURT 415

COUNTY OF NEW YORK

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against— 416

DEEMS TAYLOR, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

SIRS:

PLEASE TAKE NOTICE that the undersigned, appearing specially for James E. Markham, Alien Property Custodian, will submit the attached affidavit in opposition to the motion of the defendant to substitute the Alien Property Custodian as party plaintiff in this action in place and instead of the present plaintiff, and for the dismissal thereof. 417

Exhibit A Annexed to Affidavit of A. Walter Socolow

Dated: New York, N. Y., 1945.

418

Yours, etc.,

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York.
Appearing specially as attorney for
the Alien Property Custodian.

To:

SCHWARTZ & FROHLICH, ESQS.,
419 *Attorneys for Defendant,*
Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

A. WALTER SOCOLOW, ESQ.,
Attorney for Plaintiff,
Office & P. O. Address,
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

420

EXHIBIT B ANNEXED TO AFFIDAVIT OF
A. WALTER SOCOLOW

THE SUPREME COURT

COUNTY OF NEW YORK

HENRY M. PROPPER, as Temporary Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A. K. M.,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, an unincorporated association of more than seven members, commonly known as ASCAP,

Defendant.

WASHINGTON,
DISTRICT OF COLUMBIA, *ss.*:

FRANCIS J. MC NAMARA, being duly sworn, deposes and says:

I am the Deputy Alien Property Custodian and am authorized to exercise any and all of the powers granted and delegated to, conferred upon and vested in James E. Markham, the duly appointed, qualified and acting Alien Property Custodian of the United States of America.

On the 7th day of November, 1945 there was received at our offices in the District of Columbia, by registered mail,

a notice of motion together with an affidavit in support of
424 a motion brought on by the defendant, the purpose of which is to substitute James E. Markham, Alien Property Custodian, as the party plaintiff in place and instead of the present plaintiff in the above entitled action.

As Alien Property Custodian, James E. Markham is an officer of the United States and is not a party to this action at this time, nor does he consent to become a party either plaintiff or defendant, and he objects to the instant motion to substitute him as Alien Property Custodian as the party plaintiff.

FRANCIS J. MCNAMARA,
425 *Deputy Alien Property Custodian.*

Suscribed and sworn to before me
this 16th day of November, 1945.

JOSEPHINE A. STERLING,
Notary Public.

426

Opinion by Coxe, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 35-581

[SAME TITLE]

These are motions (1) by the plaintiff, and (2) by the defendant Propper as Receiver of an Austrian cooperative society known as AKM, for judgment on the pleadings, or in the alternative for summary judgment, with respect to Count No. 2 of the complaint.

The action is brought by the plaintiff, Alien Property Custodian, to recover different sums alleged to be owing by the defendant, American Society of Composers, Authors & Publishers (hereinafter referred to as ASCAP), to three European performing rights societies, respectively. The complaint contends three separate counts, each relating to the sum alleged to be owing by ASCAP to one of these three European societies. Count No. 2 concerns only AKM, the Austrian society for which the defendant Propper is the receiver, and as to that count it is alleged that ASCAP is now holding for AKM the net sum of $62,809.85.

The plaintiff in his motion seeks no affirmative relief against ASCAP but merely asks an adjudication that the defendant Propper as receiver has no right, title or interest in or to the funds held by ASCAP for AKM.

The facts are not in dispute, and may be summarized briefly as follows:

430 ASCAP is an unincorporated association in New York City engaged in the business of granting licenses and collecting royalties for the public performance of the musical works of its members, and alloting and distributing such royalties. Prior to December 31, 1938, AKM was a registered cooperative society with limited liability, organized under Austrian law, and engaged in Austria in the same character of business as ASCAP.

On January 1, 1933, ASCAP entered into a written contract with AKM under which AKM granted to ASCAP the exclusive right to license in the United States and its possessions the non-dramatic public performance for profit of
431 certain musical works, the performing rights of which then were or which during the term of the agreement might be vested in or controlled by AKM. ASCAP agreed to collect from its licensees royalty payments for such public performances, and, on or about the 30th day of September succeeding the close of each calendar year, to account to AKM for collections made for the preceding calendar year, and to remit to AKM the proceeds thereof after deduction of commissions and expenses. This agreement remained in force until December 31, 1938, and the sum of $62,809.85 involved in Count No. 2 is the alleged bal-
432 ance of the collections made by ASCAP for the account of AKM to and including December 31, 1938, after deduction of commissions and expenses.

On June 9, 1941, one Franz Sobotka, a national of Austrial commenced an action in the New York Supreme Court, New York County, against AKM, alleging that it was a corporation organized and existing under the laws of Austria and had been liquidated and had assets within the State of New York, and praying for the appointment of a re-

ceiver of such assets pursuant to Section 977-b of the Civil Practice Act of New York. In that action the defendant 433
Propper, on an ex parte application, was appointed on June 12, 1941, temporary receiver of the property and assets of AKM within the State of New York.

On June 14, 1941, Executive Order No. 8389, which had originally been promulgated by the President on April 10, 1940, was, with amendments, made applicable to Austria (6 F. R. 2897). Under this order the transfer of any property of Austrian nationals was prohibited unless authorized by the Secretary of the Treasury. On July 9, 1941, Propper served on ASCAP written notice of his appointment as 434
temporary receiver, together with a demand for the payment of the funds of AKM held by ASCAP, and on July 29, 1941, Propper as temporary receiver commenced an action in the State court to recover such funds. This action is still pending undetermined in the State court. On September 29, 1941, upon default of AKM, final judgment was entered against it in the receivership action, and Propper was appointed permanent receiver of the property and assets of AKM within the State of New York.

On September 4, 1943, the plaintiff, by vesting order No. 2097 (8 F. R. 16463), determined that the funds held by ASCAP for AKM were the property of AKM, and vested 435
in himself all right, title, interest and claim in and to such funds. On September 11, 1943, the plaintiff made written demand on the defendant ASCAP for the funds held for AKM, and when this demand was refused the plaintiff commenced the present action. The Secretary of the Treasury has at no time licensed or otherwise authorized the transfer of the AKM funds held by ASCAP to the defendant Propper as receiver.

The question is thus presented whether the defendant
436 Propper as receiver of the New York assets of AKM has any right, title or interest in or to the funds held by ASCAP for AKM. This is a question which this court has jurisdiction to determine. See *Markham* v. *Allen*, 326 U. S. 470. It is the contention of the defendant Propper that he acquired title to these funds upon his appointment as temporary receiver on June 12, 1941, but in any event upon his appointment as permanent receiver on September 29, 1941.

The defendant Propper was appointed temporary receiver, and later permanent receiver, in the state court in an
437 action brought against AKM under section 977-b of the New York Civil Practice Act. This section was originally enacted in 1936, and authorized the institution of an action for the appointment of a receiver of the assets in New York State of a foreign corporation which had been dissolved, liquidated or nationalized, or had ceased to do business for any reason. The purpose of the statute was to administer the New York assets of such a corporation and to prescribe a method of distribution, "irrespective of the scheme of distribution promulgated in any other state inclusive of the domicile of the foreign corporation". *Oliner* v. *American-Oriental Banking Corporation*, 252 A. D. 212,
438 aff'd 277 N. Y. 588.

The section authorizes the appointment of a temporary receiver "pending the determination of the action;" it specifies the mode of service of process on the defendant; and it provides for the entry of judgment and the appointment of a permanent receiver upon default of the defendant or after trial. It also provides that any receiver appointed pursuant to the section "shall have all the powers and du-

ties * * * as are possessed by * * * receivers * * * by the laws of the State of New York", and further, that "Title to all assets, credits, choses in action and property * * * within the State of New York shall immediately vest in the receiver upon the making of the order appointing him". 439

I find nothing in the language of this section which departs from the general New York rule, applicable to chancery as well as statutory receiverships, that a temporary receiver does not, by virtue of his appointment, obtain title, but merely a right to possession, *Keeney* v. *Home Insurance Company*, 71 N. Y. 396, 401; *Herring* v. *N. Y., L. E. & W. R. R. Co.*, 105 N. Y. 340; *Decker* v. *Gardner*, 124 N. Y. 334. See *New York General Corporation Law*, S. S. 162, 163, 168. I hold, therefore, that the defendant Propper did not acquire title to the funds held by ASCAP for AKM upon his appointment as temporary receiver on June 12, 1941. 440

It remains to consider whether the defendant Propper obtained title to the AKM funds held by ASCAP upon his appointment as permanent receiver on September 29, 1941. On this branch of the case the plaintiff insists that the defendant Propper obtained no such title by reason of the prohibitions of Executive Order No. 8389.

Executive Order No. 8389 became applicable to the property of Austrian nationals on June 14, 1941, and reads in part as follows: 441

Section 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if * * * (ii) such transactions involve property in which any foreign country designated

442 in this Order, or any national thereof, has at any time on or since the effective date of this order had any interest of any nature whatsoever, direct or indirect: * * *".

"E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; * * *".

Section 7. Without limitation as to any other powers or authority of the Secretary of the Treasury * * * under any other provision of this Order, the Secretary of the Treas-
443 ury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order * * *".

Clearly, under the language of this Order, any unlicensed transfer of the AKM funds held by ASCAP was expressly prohibited. And this prohibition was as applicable to a transfer by judicial process as to a transfer by voluntary act. Even if there were any doubt on that subject, which I do not entertain, this doubt was completely removed by the interpretative General Ruling No. 12 issued by the Secretary of the Treasury on April 21, 1942 (7 F. R. 2991). Under this Ruling it was provided in Section (1) that any
444 unlicensed transfer of funds, such as involved in the present action, was "null and void"; and in Section (4) that no transfer of such funds by judicial process created a greater right than the owner of the funds could have conferred by voluntary act prior to the issuance of a license. In view

of these prohibitions of the Executive Order I do not think that the defendant Propper obtained any title to the AKM funds held by ASCAP on his appointment as permanent receiver on September 29, 1941. 445

The New York case of *Polish Relief Comm.* v. *Banca Nationala A Rumaniei*, 228 N. Y. 332, relied on by the defendant Propper, is not in conflict with the above conclusion. That case arose on a motion by the defendant, a Rumanian banking corporation, to vacate an attachment obtained by the plaintiff, under which levies were made upon deposits maintained by the defendant in New York banking houses. It was held by a closely divided court that Executive Order No. 8389 did not forbid such an attachment because "The lien of an attachment is always hypothetical in some degree", and "A 'seizure subject to license' was sufficient * * * for the purpose of jurisdiction *in rem* over the deposits in question." All that the case stands for is that in New York a levy upon New York deposits "subject to license" is sufficient to support jurisdiction *in rem*, and is not prohibited by the Executive Order. In the present case the whole question is whether the defendant Propper as receiver has title, and the Polish relief decision made no adjudication of that question. 446

I hold therefore that the defendant Propper as receiver has no right, title or interest in the funds held by ASCAP for AKM. There may be a decree accordingly for summary judgment in favor of the plaintiff against the defendant Propper. 447

January 21, 1947

(sgd.) ALFRED C. COXE,
U. S. D. J.

Order of Substitution

448 IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. No. 35-581

[SAME TITLE]

Upon the annexed consent, it is hereby ordered that Tom C. Clark, Attorney General, as successor to the Alien
449 Property Custodian, be substituted for James B. Markham, Alien Property Custodian, as plaintiff in the above entitled action.

Dated: 1st day of November, 1946.

EDWARD A. CONGER
U. S. D. J.

450

Consent

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. No. 35-581

[SAME TITLE]

We hereby consent to the allowance of the foregoing substitution and entry of the above order.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff.

SCHWARTZ & FROHLICH,
Attorneys for the defendant,
Deems Taylor, as President of the
American Society of Composers,
Authors and Publishers.

A. WALTER SOCOLOW,
Attorney for the defendant,
Henry M. Propper; as Receiver of
the property and assets within the
State of New York of Staatlich
Genehmigte Gesellschaft der
Autoren Komponisten und Musik
verleger, commonly known as A. K. M.

Judgment

UNITED STATES DISTRICT COURT

454 SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

This cause having come on for hearing before the Honorable Alfred C. Coxe, U. S. District Judge, on motions by the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and by the defendant, 455 Henry M. Propper, receiver, for summary judgment against the other, pursuant to Rule 56 of the Rules of Civil Procedure, and the Court having examined the pleadings, affidavits, and papers on file, and having heard the argument of counsel and being otherwise fully advised and satisfied in the premises, and having found that there is no genuine issue as to any material fact to be submitted to the Court, and having concluded that the plaintiff is entitled to judgment against the defendant Henry M. Propper, receiver, as a matter of law;

IT IS ORDERED that the plaintiff's motion for summary 456 judgment against Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., be and the same is hereby in all respects granted, and

IT IS FURTHER ORDERED that the defendant Henry M. Propper's etc. motion for summary judgment be and the same is hereby in all respects denied, and

IT IS FURTHER ORDERED AND ADJUDGED that
the defendant Henry M. Propper, as receiver of the prop- 457
erty and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren Komponisten und Musikverleger, acquired no right, title or interest in or to the funds and property of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, held by the American Society of Composers, Authors and Publishers, by his appointment as receiver by the Supreme Court of New York for New York County, and has no right, title or interest in or to the said funds and property, and

IT IS FURTHER ORDERED AND ADJUDGED that 458
the plaintiff have and recover costs in the sum of $29.48 as taxed, against the defendant Henry M. Propper, of 1 Madison Avenue, New York, N. Y., as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., and that the plaintiff have execution therefor.

Dated: New York, N. Y., February 10th, 1947.

ALFRED C. COXE
U. S. D. J. 459

Notice of Appeal

460 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

SIRS:

461 Notice is hereby given that Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M., one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final judgment entered in this action on the 10th day of February, 1947, and from each and every part, as well as from the whole, thereof.

Dated, New York, February 25, 1947.

462

Notice of Appeal

Yours &c.,

463

A. WALTER SOCOLOW,
Attorney for Defendant,
Henry M. Propper as Receiver, &c.,
Office & P. O. Address:
680 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff,
U. S. Courthouse,
Foley Square, New York, N. Y.

464

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

465

Designation of Contents of Record by Defendant-Appellant

466 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

467 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

468 The defendant-appellant, Henry M. Propper, as Receiver, as aforesaid, designates the following portions of the Record to be contained in the Record on Appeal in the above entitled action:

1. Statement under Rule 15, Subdivision (b).

2. Summons issued April 22, 1946.

Designation of Contents of Record by Defendant-Appellant

3. Complaint filed April 22, 1946 and exhibits thereto annexed, omitting, however, voluminous exhibits "A" and "C" of said complaint relating solely to the first and third counts thereof, but neither of which relates to count "two" which alone affects the said defendant-appellant and is involved in the appeal herein. 469

4. Answer of defendant, Henry M. Propper, as Receiver, as aforesaid, and all exhibits therein referred to and thereto annexed, filed the 13th day of May, 1946.

5. Answer of defendant, Deems Taylor, as President, as aforesaid, filed the 10th day of October, 1946. 470

6. Notice of motion of defendant, Henry M. Propper, as Receiver, as aforesaid, dated the 28th day of May, 1946.

7. Affidavit of Henry M. Propper in support of said motion, sworn to the 28th day of May, 1946.

8. Affidavit of Morris Primoff in support of said motion and the exhibit thereto annexed, sworn to the 27th day of May, 1946.

9. Affidavit of A. Walter Socolow, in support of said motion, and the exhibit thereto annexed, sworn to the 28th day of May, 1946. 471

10. Notice of cross-motion by James E. Markham, the original plaintiff, dated the 20th day of June, 1946, and stipulation thereto attached.

11. Affidavit of James D. Hill, sworn to the 19th day of June, 1946, and exhibits therein referred to and thereto attached.

12. Affidavit of Herbert P. Jacoby, sworn to the 13th day
472 of June, 1946.

13. Affidavit of A. Walter Socolow, sworn to the 27th day of June, 1946, and all exhibits therein referred to and thereto attached.

14. Opinion of Coxe, U. S. D. J., dated the 27th day of January, 1947.

15. Final judgment appealed from, dated the 10th day of February, 1947, entered the 15th day of February, 1947.

473 16. Notice of appeal, filed February 28, 1947.

17. This designation.

18. Designation by Appellee, if any, of additional papers to be included in the Record.

19. Designation by defendant Deems Taylor, as President as aforesaid, if any, of additional papers to be included in the Record.

20. Statement of points upon which defendant-appellant
474 intends to rely upon the appeal herein.

21. Stipulation as to the record.

22. Clerk's certificate.

Dated, New York, N. Y., March 7, 1947.

Designation of Contents of Record by Defendant-Appellant

Yours &c.,

475

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y.

476

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

477

Supplemental Designation

UNITED STATES DISTRICT COURT

478 SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

479 DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

---

480 Appellee, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, plaintiff in the above entitled action, designates the following matter to be included in the Record on Appeal in addition to the matters designated by the appellant, Henry M. Propper, on March 7, 1947.

Supplemental Designation

1. Order of substitution, substituting Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, for James E. Markham, the Alien Property Custodian, as plaintiff, dated November 1st, 1946. 481

Dated, New York, N. Y., March 14, 1947

JOHN F. X. McGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y. 482

To:

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y. 483

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

484 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated
485 association of more than seven members,

Defendant,

—and—

HENRY M. POPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.,

Defendant-Appellant.

486 The Appellant states that the Points upon which he intends to rely on the appeal in this action are as follows:

1. Under the express provisions of Section 977-b, Defendant Receiver had divested A. K. M. of all right, title and interest, legal and equitable, in and to the subject of the action and the cause of action by the *ante bellum* proceedings in the Sobotka action. Such property, therefore, could not be subject to subsequent seizure by the Alien Property Custodian as the property of A. K. M.

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

2. The New York Supreme Court has acquired exclusive possession of and sole jurisdiction over the *res* herein under the *ante bellum* proceedings in the Sobotka action pursuant to statute. The New York Court's administration of the *res* cannot be interfered with by a subsequent claim of the Alien Property Custodian whose rights, if any, may be asserted by filing a claim with Defendant Receiver. 487

3. The rights and title of the Receiver and the rights of A. K. M.'s creditors who filed claims in the proceedings in the *Sobotka* action were not affected by Executive Order 8389. 488

(a) The rights and title vested in the Receiver prior to the effective date of Executive Order 8389 and could not be affected by such order.

(b) Even if the title of the Receiver were acquired subsequent to Executive Order No. 8389, it was not affected by said Order.

(c) Executive Order 8389 was not intended to, and does not, forbid or otherwise interfere with the functions of the State Courts or with any action for the recovery of moneys or property owing by A. S. C. A. P. to A. K. M. instituted by the defendant Propper as Receiver of A. K. M. 489

(d) Both Congress and the Executive have recognized the validity of the foregoing.

4. This action by Plaintiff Custodian and the judgment under review necessarily involve

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

490 (a) a denial of full faith and credit of the statutes and judicial proceedings of the State of New York, and

(b) a deprivation of vested rights in property without compensation in violation of the United States Constitution.

Therefore this action should be dismissed.

5. Upon the admitted facts presented by the pleadings and the undisputed documentary proofs of Public Record, there is a total lack of any basis for any cause of action
491 by the Plaintiff against the Defendant Receiver. Count 2 of the complaint must be dismissed.

(a) The very nature of the Custodian's action necessarily requests a determination of the Court of the legal effect of its so-called vesting order and the rights of the parties.

(b) There was no seizure whatsoever here in any way creating any rights in Plaintiff Custodian or any obligation on the part of Defendant Receiver.

492 (c) Any seizure with respect to the subject of the action would under the very terms of the Custodian's Order #2097 be limited only to the balance remaining in the hands of Defendant Receiver upon distribution under Subdivision 16 of Section 977-b by the New York Court.

6. Every consideration of public policy, law and justice requires the dismissal of the action.

Statement of Points Upon Which Appellant Intends to Rely Upon the Appeal

Dated, New York, N. Y., March 10, 1947. 493

Yours &c.,

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To: 494

HON. JOHN F. X. MCGOHEY,
United States Attorney,
Attorney for Plaintiff-Appellee,
United States Courthouse,
Foley Square,
New York, N. Y.

SCHWARTZ & FROHLICH, ESQS.,
Attorneys for Defendant
Deems Taylor, as Pres., &c.,
1450 Broadway,
New York, N. Y. 495

Stipulation as to Record

UNITED STATES DISTRICT COURT

496

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of the said District Court in the above entitled matter, as agreed upon by the parties.

Dated, New York, New York, April , 1947.

497

A. WALTER SOCOLOW
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A. K. M.

JOHN F. X. MCGOHEY
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

498

SCHWARTZ & FROHLICH
Attorney for Defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

Clerk's Certificate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

499

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the above entitled matter as agreed on by the parties. 500

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of April in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the said United States, the one hundred and seventy-first.

WILLIAM V. CONNELL,
Clerk.

501

[SEAL]

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SUPREME COURT, U. S.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER,

vs.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1948.

CERTIORARI GRANTED JANUARY 3, 1949.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

1

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant-Appellee,

2

and

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appellant.

Statement Under Rule 15, Subdivision (b)

3

This action was commenced on the 22nd day of April, 1946. The names of the original parties are James E. Markham, Alien Property Custodian, plaintiff, and Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, and Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M., defendants.

Statement Under Rule 15, Subdivision (b)

There has been no change of parties to the action except that Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, was substituted as plaintiff in place and stead of James E. Markham, Alien Property Custodian, the original plaintiff.

The complaint in the action was filed on the 22nd day of April, 1946. The answer of defendant Henry M. Propper, as Receiver, etc., was filed on the 13th day of May, 1946. The answer of the defendant Deems Taylor, as President, etc., was filed on the 7th day of October, 1946.

No defendant was arrested, or bail taken; no property was attached or arrested on account of the proceedings hereunder.

No trial was had herein.

The final decree appealed from was entered upon a stipulation between plaintiff-appellee and defendant-appellee over the opposition of defendant-appellant.

Previous to said final decree appealed from, a judgment was entered as the result of a decision by Cox, U.S.D.J., rendered the 21st day of January, 1947, upon (1) a motion by the defendant Henry M. Propper, as Receiver, as aforesaid, for judgment on the pleadings under Subdivision "c" of Rule 12 of the Rules of Civil Procedure, or for summary judgment under Rule 56 of the Rules of Civil Procedure, dismissing Count 2 of the complaint herein; and (2), a cross motion by the plaintiff for judgment on the pleadings, or for summary judgment in favor of the plaintiff and against said defendant receiver on Count 2 of the complaint. An appeal to this Court from said judgment resulted in a decision of this court dismissing said appeal on the specific ground that said judgment was not final and was not therefore appealable. Accordingly, said judgment is now also

Statement Under Rule 15, Subdivision (b)

brought for review on the appeal from said final decree. The record in said previous appeal is stipulated as forming part of this record. 7

No question was referred to a master or referee; and no result of such proceedings and no report on any such reference exist.

The final decree appealed from is dated the 21st day of November, 1947, and was entered on the same day. This appeal was taken on the 5th day of December, 1947.

The previous judgment brought up for review herein is dated the 10th day of February, 1947, and was entered on the 11th day of February, 1947, on the basis of a decision by Coxe, *U.S.D.J.*, dated January 21, 1947. The previous appeal from said judgment was taken on February 28, 1947. 8

9

Stipulation Dated November 13, 1947

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 35-581

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff,

—v.—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

and

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendants.

It is stipulated and agreed by and between the plaintiff, Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter called ASCAP), as follows:

1. This stipulation supersedes Count II of the stipulation between the parties dated May 15, 1947.

2. The royalties allocable by ASCAP to Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.) for the period prior to December 31, 1938, pursuant to the terms of the written agreement between ASCAP and A.K.M. dated January 1, 1933, and which are claimed by plaintiff under Vesting Order 2097 or otherwise under Count II of his complaint herein, are in the total net sum of forty-six thousand eight hundred thirty-nine dollars and fifty-four cents ($46,839.54), after payment of all Federal, state and local taxes. Defendant represents that these taxes have been paid and assumes responsibility for their payment.

3. The defendant consents to the immediate entry of a final decree herein, in the form hereto annexed, under Section 17 of the Trading with the Enemy Act, as amended, directing the defendant to pay and deliver to the plaintiff the said sum of $46,839.54.

4. All of the foregoing shall be without prejudice to the rights of ASCAP, if any, to file any claim or to proceed against the United States, the plaintiff, his successors in office, or the Treasurer of the United States under the procedure provided by the Trading with the Enemy Act, as amended, or otherwise, to establish and secure payment of any debts, claims, or demands owing to ASCAP by A.K.M. or its members from any money or property held by the United States or by the plaintiff or his successors in office, or by the Treasurer of the United States under the Trading with the Enemy Act, as amended.

5. If an appeal be taken by any party to this action from the final decree entered pursuant to this stipulation, and

if, as a final result of said appeal, such decree (or the interlocutory decree herein of February 10, 1947) be reversed, the final decree so entered pursuant to this stipulation shall be vacated.

6. Execution shall be stayed until 30 days after the time to appeal from the final decree to be entered pursuant to this stipulation has expired, and, if such appeal is taken, until 30 days after the final termination of said appeal and issuance of mandate thereon to the District Court.

Dated: New York, November 13, 1947.

TOM C. CLARK, *Attorney General*, as successor to the Alien Property Custodian.

By JAMES D. HILL

JAMES D. HILL,
Attorney for Plaintiff.

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers.

By (s) SCHWARTZ & FROHLICH

SCHWARTZ & FROHLICH,
Attorneys for Defendant.

Objections

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 35-581

[SAME TITLE]

Now comes the defendant Henry M. Propper as Receiver as aforesaid and as and for his objections to the entry of final decree pursuant to stipulation between the plaintiff as successor as aforesaid and the defendant Deems Taylor as president as aforesaid, dated the 13th day of November, 1947, upon a hearing at pretrial conference pursuant to notice of motion for such pretrial conference dated the 6th day of November, 1947, and alleges:

1. That under the mandate of the Circuit Court of Appeals and the pleadings herein, there are serious questions of both fact and law requiring regular and legal trial of the action, and the Court is without jurisdiction, power or authority to enter a final decree pursuant to said stipulation upon a pretrial conference.

2. That all right, title and interest, both legal and equitable, in and to the subject of the second count of the action vested in the defendant Propper as Receiver by the order of his appointment dated June 12, 1941, and subsequently confirmed by the final judgment in the State Court action dated September 29, 1941, both entered under and by virtue of Section 977-B of the New York Civil Practice Act.

Objections

22 3. That the subject of Count 2 of the action and said cause of action herein have been, since June 12, 1941, and still are, in the exclusive custody, possession and jurisdiction of the Supreme Court of the State of New York, subject to its exclusive orderly administration through receivership proceedings pending therein. The proposed final decree pursuant to said stipulation is an interference with such custody, possession and jurisdiction of said State Supreme Court.

4. That this Court is without jurisdiction, power or au-
23 thority to proceed in this action until a final determination is made by the courts of the State of New York of the actions now pending therein between the defendant Henry M. Propper, as Receiver as aforesaid, as plaintiff, and the defendant Deems Taylor, as President, as aforesaid, construing the New York State statute (Section 977-B of the New York Civil Practice Act) in relation to the rights and title of the defendant Propper as Receiver under said statute.

5. The final decree proposed to be entered pursuant to said stipulation necessarily involves a review of the order
24 of the New York Supreme Court appointing Henry M. Propper Receiver and expressly vesting in him as such Receiver all right, title and interest in and to the subject of Count 2 of this action and the said cause of action herein which review is limited to the Appellate Courts of the State of New York and is beyond the jurisdiction, power and authority of this Court.

6. The final decree proposed to be entered pursuant to said stipulation necessarily involves

Objections

(a) A denial of full faith and credit of the statutes and judicial proceedings of the State of New York in violation of the Constitution of the United States, and 25

(b) A deprivation of vested rights in property without compensation and without due process of law likewise in violation of the Constitution of the United States.

7. The final decree proposed to be entered pursuant to said stipulation is in violation of the rights of creditors who filed claims against the defendant Propper as Receiver and of the lien of the attorneys in the state receivership action, none of whom are parties to this action. 26

8. The stipulation which is the basis of the proposed final decree was entered into between the defendant Deems Taylor, as President, as aforesaid, as the debtor, and the plaintiff as successor of the Alien Property Custodian whose rights, if any, are possessory only and who had no power to settle or compromise on the terms proposed in the stipulations so as to affect the rights of the defendant Propper as Receiver and those of the creditors who filed claims or the lien of the attorneys in the State Court actions. 27

9. That the stipulation which is the basis of the final decree proposed to be entered herein purports to be a settlement for a substantially smaller sum of an admittedly large claim between the defendant Deems Taylor as aforesaid and the plaintiff as successor of the Alien Property Custodian. The latter is a public official who is acting without authority or power in that the said stipulation pur-

28 ports to settle the subject of Count 2 of the action and the sole cause of action herein for $46,839.54 which operates as a gratuity to the defendant ASCAP in that

(a) The amount due from the defendant ASCAP under the agreement in question only up to the end of 1938, as established by the admissions and documentary proofs elicited from said defendant in the State Court action, is the sum of $73,382.92 with interest from the 12th day of June, 1941. A statement of said indebtedness, with references to said proofs, is hereto annexed and made a part hereof (Exhibit A).

29

(b) Defendant Deems Taylor, as President, as aforesaid, is likewise indebted for the amounts due upon an accounting amounting, upon information and belief, to upwards of $200,000, for which a separate action is pending in the Supreme Court of the State of New York between defendant Propper as Receiver and the defendant Deems Taylor as aforesaid. A copy of the complaint in said action is hereto annexed and made part hereof (Exhibit B).

(c) In addition, the defendant ASCAP is in possession of the catalogue of A.K.M., the subject of said

30 complaint (Exhibit B), of the value of upwards of $250,000.

WHEREFORE, the defendant Henry M. Propper, as Receiver, as aforesaid, prays that the entry of a final decree pursuant to said stipulation be denied and that the judgment heretofore entered on the motion for summary judgment herein be vacated, and that all proceedings in the action be stayed pending final determination by the New

York State Courts of the actions therein pending, and for such other and further relief as to the Court may seem just and proper. 31

Dated, New York, November 20, 1947.

A. Walter Socolow
Attorney for Defendant Henry M. Propper, as Receiver of the property, etc. of A.K.M.
Office and Post Office Address:
No. 580 Fifth Avenue
Borough of Manhattan 32
New York 19, N. Y.

To:

Hon. John F. X. McGohey
United States Attorney
Attorney for Plaintiff
U. S. Court House
Foley Square
New York, N. Y.

Schwartz & Frohlich, Esquires
Attorneys for Defendant Deems Taylor, As President, etc. 33
1450 Broadway
New York, N. Y.

EXHIBIT A

THE AMOUNTS ADMITTEDLY UNPAID AND UNACCOUNTED FOR BY ASCAP TO AKM FOR THE YEARS 1936-1938

34

The admissions in the examination and the exhibits therein establish conclusively that there became due from ASCAP to AKM under the agreement, during the years 1936-1938, the following sums (References are to ASCAP'S examination before trial and exhibits therein in the state court action):

A. Amount Due Under the Agreement:

35

As of September 30, 1937 a balance due ASCAP to AKM for the year 1936 after deducting the amount admittedly accounted for by AKM to ASCAP for the same year, as shown in ASCAP's repartition statement for 1936 (pp. 15-16; Ex. 2, 1936 statement dated April 4th, 1938)	$11,376.78
36 As of September 30, 1938, the net total after claimed tax deductions which ASCAP admits to be due to AKM for the year 1937 as shown from ASCAP's repartition statements for that year (p. 17, Ex. 2 [a])	29,345.62

Exhibit A

As of September 30, 1939, the net total after claimed tax deductions which ASCAP admits to be due to AKM for the year 1938 as shown from the yellow work sheets prepared by ASCAP (p. 18, Ex. 3)	12,448.92		37
Total admittedly due under the agreement of at least		$53,171.32	
B. Tax Adjustments:			38
As of September 30, 1939 the amount of withholding tax for the year 1938 as shown from the yellow work sheets prepared by ASCAP which admittedly has not been paid (p. 20, Ex. 3)	$ 4,722.01		
As of December 31, 1936, the amount of tax adjustments for the years 1933, 1934 and 1935 as shown from schedules attached in the examination before trial (pp. 16, 38, Ex. A.)	4,916.52	9,638.53	39
Grand Total Due AKM from ASCAP		$62,809.85	

The interest on this indebtedness to the date of Mr. Propper's appointment as Temporary Receiver on June 12, 1941, amounts to $10,975.07, as follows:

Exhibit A

40

INTEREST ON TAX ADJUSTMENTS:

1933,	$ 984.23 @ 6%, 9/30/34 to 6/12/41,	$ 401.17
1934,	1,564.99 @ 6%, 9/30/35 to 6/12/41,	543.84
1935,	2,367.30 @ 6%, 9/30/36 to 6/12/41,	680.60

INTEREST ON ROYALTIES DUE AS PER ASCAP STATEMENTS:

1936,	$11,376.78 @ 6%, 9/30/37 to 6/12/41,	$ 2,588.19
1937,	29,345.62 @ 6%, 9/30/38 to 6/12/41,	4,915.39
41 1938,	12,448.92 @ 6%, 9/30/39 to 6/12/41,	1,338.26
	* 4,722.01 @ 6%, 9/30/39 to 6/12/41,	507.62
	$62,809.85	$10,975.07

* Unpaid withholding tax deducted for 1938.

42

EXHIBIT B

SUPREME COURT

COUNTY OF NEW YORK

43

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of STAATLICH GENEHMIGTE GESELLSCHAFT DER AUTOREN, KOMPONISTEN UND MUSIKVERLEGER, commonly known as A.K.M.,

Plaintiff,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, commonly known as ASCAP, 44

Defendant.

COMPLAINT

The plaintiff, by his attorney, A. Walter Socolow, complaining of the defendant, alleges as follows:

FIRST: Upon information and belief, that at all times hereinafter mentioned and up to some time in 1938 Staatlich Genehmigte Gesellschaft der Autoren Komponisten und Musikverleger (commonly known and hereinafter referred to as A.K.M.) was a foreign corporation organized and existing under and by virtue of the laws of the former Republic of Austria. 45

SECOND: Upon information and belief, that at all the times hereinafter mentioned American Society of Com-

46 posers, Authors and Publishers (commonly known as hereinafter referred to as ASCAP) was and still is an unincorporated association consisting of more than seven (7) persons and had and still has its principal place of business in the City, County and State of New York.

THIRD: Upon information and belief, that at the commencement of this action the defendant Deems Taylor was and still is the president of said ASCAP.

FOURTH: Upon information and belief, that on or about the 1st day of January, 1933, said A.K.M. and the said
47 ASCAP entered into an agreement in writing, wherein and whereby, subject to certain restrictions, during the period of said agreement, or extensions thereof, the said A.K.M. granted to the said ASCAP the sole and exclusive right to license in the United States, Alaska, Puerto Rico, the Philippine Islands, the Virgin Islands, Hawaii, and its colonies and possessions, the nondramatic public performance for profit, as therein defined, of certain copyrighted musical works, the performing rights of which then were or during the term of said agreement might be vested in or controlled by said A.K.M., and the said ASCAP agreed to require of
48 and collect from its licensees for the public performance of said musical works payment therefor upon the basis and in the manner specified in said agreement and to account to the said A.K.M. for each year on or before each 30th day of September succeeding the close of each calendar year during the term of said agreement and to pay over to said A.K.M. such moneys in respect to the public performance of such musical works as may be found to be due A.K.M. in accordance with said agreement; a copy of which agreement, exclusive of the list of said musical works referred

to therein as attached thereto, is hereto annexed and made part hereof, marked "Exhibit A". 49

FIFTH: Upon information and belief, that the said agreement by extensions or renewals thereof continued in force until the end of the calendar year of 1938, at which time the said agreement terminated and came to an end.

SIXTH: That during the period of said agreement, and as an incident thereof, the defendant ASCAP acquired possession and control of a certain listing or catalogue of musical compositions and other property and assets belonging to said A.K.M., all of which came into the possession of the defendant ASCAP, and were entrusted into its care and custody during the continuance of said agreement solely for the purposes of and particularly for the due performance of said agreement. 50

SEVENTH: That upon the termination of said agreement in or about the end of the calendar year 1938, as aforesaid, the defendant ASCAP ceased to have any right, title or interest in or to the said listing or catalogue, or in or to any of the musical compositions or in or to any other property of said A.K.M., or in or to the public performance or other use thereof, and the said ASCAP did not at any time after such termination have any such right, title or interest. 51

EIGHTH: Upon information and belief, that subsequent to such termination of said agreement, the said ASCAP continued and still continues to license and authorize others to license the performance of said musical works in the territories aforesaid and continued and still continues

52 to be credited with and to receive and collect therefrom large and substantial sums of money as license fees, income and otherwise.

NINTH: That the defendant ASCAP had never accounted for any of the property and moneys so collected and received by it from such continued licensing and authorization to license as aforesaid.

TENTH: That said continued licensing and authorization to license, and said continued collection and receipt of moneys and income, after the termination of said agreement, by the defendant ASCAP as aforesaid, were without permission or authority and in violation of the provisions for such termination of said agreement and of the fiduciary relation created thereby, and constituted a breach of trust by the defendant ASCAP.

53

ELEVENTH: That on the 12th day of June, 1941, by an order duly made by the Supreme Court of the State of New York and duly filed and entered in the office of the Clerk of the County of New York on the 13th day of June, 1941; the plaintiff was duly appointed Temporary Receiver of the property and assets of said A.K.M. within the State of New York, in an action brought by one Franz Sobotka against said A.K.M., upon a complaint alleging that said A.K.M. was liquidated and ceased to do business and demanding judgment for the appointment of a receiver to liquidate the property and assets of said A.K.M. within the State of New York, pursuant to Section 977-h of the Civil Practice Act.

54

Exhibit B

TWELFTH: That thereafter and prior to the commencement of this action, the plaintiff duly gave and filed his bond as such Temporary Receiver duly approved by a Justice of the Court as required by said order and said bond with such approval thereon was, prior to the commencement of this action and still is, on file in said Supreme Court, and said plaintiff has duly qualified and is now acting as such Receiver. 55

THIRTEENTH: That thereafter, and on or about the 29th day of September, 1944, by a final judgment entered in said action making permanent plaintiff's appointment as Receiver, pursuant to said statute, the plaintiff duly qualified and has ever since been and still is acting as such receiver. 56

FOURTEENTH: That by virtue of said statute of the State of New York under which the plaintiff was appointed Temporary Receiver and continued as Permanent Receiver; as aforesaid, title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which said A.K.M. then owned, was entitled to or might be entitled to claim or receive within the State of New York, vested in the plaintiff as such Temporary Receiver immediately upon the making of the order appointing him as such Temporary Receiver. 57

FIFTEENTH: That by the express provisions in the order appointing plaintiff Temporary Receiver, and by the express provisions of said statute under which said order was made, the plaintiff as such Temporary Receiver acquired all the powers and duties, in addition to those therein provided for, as are possessed by and confined upon receivers and trustees by the laws of the State of New York.

Exhibit B

58 SIXTEENTH: That by the express provisions of the statute under which the plaintiff was appointed receiver as aforesaid, the plaintiff as such receiver was and is deemed to be in possession of all property and assets, tangible and intangible, of the said A.K.M., in possession and control of the defendant ASCAP from the date of the service upon defendant ASCAP of a demand therefor, together with a copy of the order appointing plaintiff receiver.

SEVENTEENTH: That on or about the 9th day of July, 1941, and prior to the commencement of this action, there was duly served upon the said ASCAP a certified copy of said 59 order appointing plaintiff Temporary Receiver as aforesaid and a certificate of the Clerk of the County of New York certifying the qualification of the plaintiff as Temporary Receiver, together with a written demand, a copy of which is hereto annexed and made part thereof, marked "Exhibit B", requiring said ASCAP to, among other things

(a) Forthwith turn over and deliver to the plaintiff as such Temporary Receiver any and all property belonging to A.K.M. in its possession, including the listings and catalogue of musical works and compositions, and the performing rights thereto, in the United States 60 of America and its territories and possessions, and any and all other property of said A.K.M., and

(b) Forthwith to render to the plaintiff as such Temporary Receiver a just and true accounting with respect thereto, and forthwith to pay to the plaintiff as such Temporary Receiver any and all moneys found due from the defendant ASCAP to said A.K.M.

EIGHTEENTH: That the defendant ASCAP failed, neglected and refused to turn over and deliver to the plaintiff as receiver or otherwise the said listings and catalogue, or any of the other property and assets of said A.K.M. so coming into its possession and entrusted to its care and custody as aforesaid, and failed, neglected and refused to render to the plaintiff as receiver or otherwise any accounting whatsoever with respect thereto, or with respect to the moneys and income as received by the defendant ASCAP after the termination of said agreement as aforesaid.

NINETEENTH: That defendant ASCAP wrongfully and unlawfully misappropriated said listings and catalogue and the other property and assets of said A.K.M. coming to its possession, and entrusted to its care and custody, including said moneys and income, to its own exclusive use and benefit, and wrongfully and unlawfully, without permission or consent of the plaintiff, continued ever since and still continues to exploit said listing and catalogue and other property of said A.K.M. by continuing to license and authorize others to license the performance of said musical works in the territories aforesaid and to collect and receive large and substantial income therefrom and to appropriate such income to its own exclusive use, without accounting therefor or for any part thereof.

TWENTIETH: That the aforesaid acts and conduct of said defendant ASCAP were and are wrongful and unlawful and willful interference by defendant ASCAP with the rights and title of the plaintiff in the property and assets of said A.K.M. so vested in him by said statute of the State of New York as aforesaid, and were and are wrongful, will-

64 ful and unlawful interferences with plaintiff's possession of said property and assets also so vested in the plaintiff as receiver as aforesaid, and with the powers and duties conferred upon plaintiff as receiver as aforesaid.

WHEREFORE, plaintiff demands judgment against the defendant

1. Adjudging and decreeing that upon the termination of said agreement in or about the end of the calendar year 1938 the defendant ASCAP ceased to have any right, title or interest in or to the said listing or catalogue or in or to
65 any of the musical compositions or to any other property of said A.K.M. or in or to the public performance, and that the said ASCAP did not at any time after such termination have any such right, title or interest.

2. Adjudging, decreeing and directing that the defendant account to the plaintiff as receiver as aforesaid for any and all transactions, dealings and matters and things with respect to said listing and catalogue and the performing rights therein, and all other property of said A.K.M. so coming into its possession and entrusted to its care
66 and custody as aforesaid.

3. Adjudging, decreeing and directing that the defendant account to the plaintiff as receiver as aforesaid for any and all moneys or other property collected and received by it as a result of any and all licenses and authorization to license, the performance of said musical compositions or otherwise at any time since December 31, 1938.

4. Adjudging, decreeing and directing that the defendant pay to the plaintiff as receiver as aforesaid any and all

moneys which may be found due from it to the plaintiff upon such accounting.

5. Adjudging, decreeing and directing that the plaintiff forthwith turn over and deliver to the plaintiff as receiver as aforesaid all listings and catalogues with respect to property and assets of said A.K.M. which at any time came into its possession or were entrusted to its care and custody.

6. Enjoining and restraining the defendant from further entering into any and all contracts of licensing or from in any way or manner making any further use directly or indirectly of said listings or catalogues or any other property of said A.K.M., or otherwise dealing or interfering therewith, and collecting or receiving any further money or other property by reason thereof.

7. That the plaintiff have such other, further and different relief in the premises as to the Court may seem just and equitable, together with the costs and disbursements of this action.

A. Walter Socolow
Attorney for Plaintiff
Office and Post Office Address
No. 580 Fifth Avenue
Borough of Manhattan
New York 19, N. Y.

(Verified October 9, 1947)

Exhibit B

70 *Exhibit A* attached to the foregoing complaint consists of agreement, copy of which is attached to and made part of Count 2 of plaintiff's complaint in this action.

Exhibit B attached to the foreging complaint is demand by defendant Propper, as Receiver, on ASCAP, a copy of which is annexed to the answer of defendant Propper in this action.

71

72

Final Decree

DISTRICT COURT OF THE UNITED STATES 73

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The above matter having come on for hearing at pretrial conference on this 14th day of November, 1947, and the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, and the defendant, Deems Taylor, as President of the American Society of Composers, Authors and Publishers, etc., having presented to the court 74
a stipulation entered into by said parties on May 15, 1947, by the terms of which the said parties have agreed and stipulated for settlement of plaintiff's claims under counts I and III of the complaint herein, and said settlements having been effected and said counts dismissed, and the said parties having presented to the court a further stipulation entered into between them on November 13, 1947, in which the said parties have agreed that the royalties allocated by the defendant in respect of the works of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (A.K.M.) and demand by the plaintiff in count II 75
of the complaint herein are in the amount of $46,839.54, the said parties having further agreed in said stipulation for immediate entry of final decree under Section 17 of the Trading with the Enemy Act, as amended, directing the defendant to pay over and deliver to the plaintiff the moneys so allocated by the defendant in respect of the works of A.K.M., saving to the defendant, however, all of its rights, if any, under the Trading with the Enemy Act,

as amended, for return of said moneys or any part thereof, and said stipulations having been filed herein, and the court having examined the pleadings and papers on file, including the objections filed by the defendant Propper as receiver, dated Nov. 20, 1947, and having heard the statements of counsel and being fully advised and satisfied in the premises, it is therefore

ORDERED, ADJUDGED and DECREED that the defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers, etc., pay over and deliver to the plaintiff Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, the sum of $46,839.54, without interest and without costs.

Dated: New York, New York,
November 21, 1947.

ALFRED C. COXE,
U. S. D. J.

Notice of Appeal

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

NOTICE IS HEREBY GIVEN that Henry M. Propper, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M., one of the defendants above named, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the final decree entered in this action on the 21st day of November, 1947; and that said defendant, as such Receiver aforesaid, also hereby appeals to the said United States Circuit Court of Appeals for the Second Circuit from, and will bring up for review upon the appeal from said final decree, the judgment entered in this action on the 10th day of February, 1947; and that the said defendant as such Receiver aforesaid hereby appeals from each and every part as well as from the whole of said final decree and judgment and each of them.

Dated: New York, December 5, 1947.

82

Yours, &c.,

A. WALTER SOCOLOW,
Attorney for Defendant,
Henry M. Propper, as Receiver, &c.,
Office & P. O. Address:
580 Fifth Avenue,
Borough of Manhattan,
City of New York.

To:

HON. JOHN F. X. MCGOHEY,
83 *United States Attorney,*
Attorney for Plaintiff,
U. S. Courthouse,
Foley Square, New York, N. Y.

SCHWARTZ & FROHLICH, Esqs.,
Attorneys for Defendant,
Deems Taylor, as Pres., etc.,
1450 Broadway,
New York, N. Y.

84

Statement of Points

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TOM C. CLARK, Attorney-General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members,

Defendant-Appellant.

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appelant.

The appellant states that the points upon which he intends to rely on the appeal in this action are as follows (in addition to the points set forth at page 162-164 of the transcript of Record on the previous appeal, which is to form part of the record on the appeal herein):

1. That under the mandate of the Circuit Court of Appeals and the pleadings herein there are serious questions of both fact and law which require a regular legal trial

of the action, and the District Court was without jurisdiction, power or authority to enter a final decree pursuant to the stipulation presented at the pretrial conference.

2. That the District Court was without jurisdiction, power or authority to proceed in this action until a final determination had been made by the courts of the State of New York of the actions now pending therein between the defendant, Henry M. Propper as Receiver as aforesaid, as plaintiff, and the defendant, Deems Taylor as President as aforesaid, construing the New York State statute (Section 977-B of the New York Civil Practice Act) in relation to the rights and title of the defendant Propper as receiver under said statute.

3. That the District Court was without jurisdiction, power and authority to enter the final decree pursuant to the stipulation presented at the pretrial conference, which necessarily involved a review of the order of the New York Supreme Court appointing Henry M. Propper receiver, under which he was expressly vested with all right, title and interest in and to the subject of Count 2 of the complaint in this action and the said cause of action herein. Such review is limited to and should be made by the Appellate courts of the State of New York.

4. That the final decree entered pursuant to the stipulation presented at the pretrial conference is in violation of the rights of creditors who filed claims against the defendant Propper as receiver and of the liens of the attorneys in the State receivership action, none of whom is a party to this action.

5. That the stipulation which is the basis of the final decree herein was entered into between the defendant, Deems Taylor as president, as aforesaid, as the debtor, and the plaintiff as successor of the Alien Property Custodian. The plaintiff's rights, if any, are possessory only, and he had no power to settle or compromise Count 2 of the action on the terms proposed in the stipulation which affects the rights of the defendant Propper as receiver and the rights of creditors who filed claims in the State court action and the liens of said receiver's attorneys. 91

6. That the stipulation which is the basis of the final decree entered herein provides for the payment of an unreasonable and inadequate sum and, in effect, operates as a gratuity to the defendant Taylor as president of American Society of Composers, Authors and Publishers, since it purports to be a settlement of an admittedly large claim for a substantially smaller and inadequate sum, without any justification or basis for such reduction. 92

Dated, New York, N. Y., February 26, 1948.

Yours, etc.,

93

A. Walter Socolow
Attorney for Defendant-Appellant
Henry M. Propper, as Receiver, etc.
Office and Post Office Address:
580 Fifth Avenue
Borough of Manhattan
New York 19, N. Y.

94 To:

Hon. John F. X. McGohey
United States Attorney
Attorney for Plaintiff-Appellee
United States Court House
Foley Square
New York, N. Y.

Schwartz & Frohlich, Esqs.
Attorney for Defendant-Appellee
Deems Taylor, as President, etc.
1450 Broadway
New York, N. Y.

96

Stipulation as to Transcript of Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

97

[SAME TITLE]

IT IS HEREBY STIPULATED and AGREED that the Transcript of Record on the previous appeal herein from the judgment dated and entered the 10th day of February, 1947, be and the same hereby is made a part of the record upon the appeal herein from the final decree made and entered the 21st day of November, 1947, and that the re-printing of said Transcript of Record on said previous appeal be and the same hereby is dispensed with and that printed copies of said Transcript of Record now on file in the Office of the Clerk of the Circuit Court of Appeals may be submitted upon the argument and submission of the appeal herein and may be referred to by any of the parties in their respective arguments or briefs with the same force and effect as if said Transcript of Record were printed in this record on appeal herein.

98

IT IS FURTHER STIPULATED and AGREED that this stipulation shall be printed as part of the record on appeal herein.

99

Stipulation as to Transcript of Record

Dated: New York, New York,
March 3rd, 1948.

A. WALTER SOCOLOW,
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and Assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.

JOHN F. X. MCGOHEY,
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

SCHWARTZ & FROHLICH,
Attorney for Defendant-Appellee Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

Stipulation as to Record

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendant-appellant, Henry M. Propper, as Receiver, as aforesaid, designates the following portions of the Record to be contained in the Record on Appeal in the above-entitled action, which, together with the Transcript of Record on the previous appeal, and the opinion of the Circuit Court on said appeal, are to form the entire record on this appeal:

1. Statement under Rule 15, Subdivision (b).

2. Stipulation dated November 13, 1947.

3. Objections of defendant, Henry M. Propper, as Receiver aforesaid, dated November 13, 1947, and the Exhibits thereto annexed, filed November 21, 1947.

4. Final decree appealed from, dated and entered November 21, 1947.

5. Notice of appeal dated December 5, 1947, and filed December 8, 1947.

6. This designation.

7. Designation by appellees of additional papers, if any, to be included in the record.

106 8. Statement of points upon which defendant-appellant intends to rely upon the appeal herein.

9. Stipulation as to the Transcript of Record on the previous appeal being part of this record.

10. Stipulation as to the record on this appeal.

11. Clerk's certificate.

Dated, New York, N. Y., February 26, 1948.

107 Yours, etc.,

A. WALTER SOCOLOW
Attorney for Defendant-Appellant
Henry M. Propper, as Receiver, &c.
Office & Post Office Address
580 Fifth Avenue
Borough of Manhattan
City of New York

To:

HON. JOHN F. X. McGOHEY
108 *United States Attorney*
Attorney for Plaintiff-Appellee
United States Courthouse
Foley Square
New York, N. Y.

SCHWARTZ & FROHLICH, Esqs.
Attorneys for Defendant-Appellee
Decas Taylor, as President, &c.
1450 Broadway
New York, N. Y.

Stipulation

UNITED STATES CIRCUIT COURT OF APPEALS 109
SECOND CIRCUIT

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Plaintiff-Appellee,

—against—

DEEMS TAYLOR, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members, 110

Defendant-Appellee,

—and—

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.,

Defendant-Appellant.

111

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the Record of the said District Court in the above-entitled matter, as agreed upon by the parties.

Stipulation

Dated, New York, N. Y., March , 1948.

112

A. Walter Socolow,
Attorney for Defendant-Appellant Henry M. Propper, as Receiver of the Property and Assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly known as A.K.M.

113

John F. X. McGohey,
Attorney for Plaintiff-Appellee Tom C. Clark, Attorney General, as successor to the Alien Property Custodian.

Schwartz & Frohlich,
Attorneys for Defendant-Appellee Deems Taylor, as President of the American Society of Composers, Authors and Publishers, an unincorporated association of more than seven members.

114

Clerk's Certificate

UNITED STATES DISTRICT COURT 115

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of 116
New York, do hereby certify that the foregoing is the transcript of the printed record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York this 8 day of March, in the year of our Lord one thousand nine hundred and forty-eight and of the Independence of the said United States, the one hundred and seventy-second.

WILLIAM V. CONNELL,
Clerk. 117

(Seal)

[fol. 40] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1947

No. 294

(Argued June 2, 1948. Decided August 3, 1948).

Docket No. 21018.

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian, Plaintiff-Appellee,

v.

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of AKM, Defendant-Appellant

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action by James E. Markham, Alien Property Custodian, for whom Tom C. Clark, Attorney General of the United States, has been substituted as successor, against Henry M. Propper, as receiver of the assets within the State of New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger, commonly [fol. 41] known as AKM, and Deems Taylor, as president of the American Society of Composers, Authors and Publishers, called ASCAP, for amounts owed to AKM by ASCAP and for a declaration that defendant Propper had no rights thereto. From an order holding defendant Propper without rights to the property in question, 70 F. Supp. 202, and a final judgment for plaintiff, defendant Propper appeals. Affirmed.

A. Walter Socolow, of New York City, for Henry M. Propper, defendant-appellant.

Herbert P. Jacoby, of New York City (Schwartz & Frohlich and Louis D. Frohlich, all of New York City, on the brief), for Deems Taylor, defendant-appellee.

David Schwartz, Atty., Office of Alien Property, Dept. of Justice, of Washington, D. C. (David L. Bazelon, Asst. Atty. Gen., Dir., Office of Alien Property, Max Isenbergh, Sp.

Asst. to the Atty. Gen., and James L. Morrisson and David E. Feller, Attys., Office of Alien Property, Dept. of Justice, all of Washington, D. C., and John F. X. McGohey, U. S. Atty., of New York City, on the brief), for Tom C. Clark, Atty. Gen., plaintiff-appellee.

CLARK, *Circuit Judge*:

This appeal raises the questions whether a temporary receiver appointed by a New York state court over assets of German nationals has such title as to defeat a later freezing order of the Executive prohibiting the transfer of enemy [fol. 42] funds and a still later seizure by the Alien Property Custodian or, if not, whether the appointment of a permanent receiver after the effective date of the order is a bar to the Custodian's claim. The district court decided against the claims of the receiver, defendant Propper, and dismissed him from the case. *Markham* v. *Taylor*, D. C. S. D. N. Y., 70 F. Supp. 202. He appealed, but since no final judgment had been entered against the other defendant for the amount due, we dismissed the appeal. *Clark* v. *Taylor*, 2 Cir., 163 F. 2d 940. Final judgment now having been entered, this appeal by Propper tests its validity as well as that of the earlier judgment against him alone.

Since the two previously published opinions just cited contain a review of the facts, we shall limit ourselves to such further statement as is here immediately necessary. The subject matter of the controversy is a sum of money owed as royalties by the American Society of Composers, Authors and Publishers, an unincorporated association, to a similar Austrian organization, AKM, under a contract between the two. Deems Taylor, as president of ASCAP, and Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, have stipulated the amount due to be $46,839.54; and the final judgment ordered the payment of that sum to the Attorney General. On June 12, 1941, defendant Propper was appointed temporary receiver of the assets of AKM located in the State of New York; and this appointment was made permanent by the state court on September 29 of the same year. Meanwhile, on June 14, 1941, the President of the United States by Exec. Order 8389, 5 F. R. 1400, as amended by Exec. Order 8785, 12 U. S. C. A. §95a note, 3 C. F. R., 1941 Supp., p. 225, 6 F. R. 2897, prohibited the transfer of Austrian property unless authorized by the Secretary of the Treasury. The Sec-

retary has not authorized any transfer of AKM assets. On July 29, 1941, Propper sued Taylor, representing ASCAP, in [fol. 43] the New York state courts to recover the sum allegedly due. This suit has not yet been finally adjudicated. On September 4, 1943, the Alien Property Custodian, plaintiff's predecessor, vested in himself all assets held by ASCAP for the Austrian organization. ASCAP, however, refused the Custodian's demand for a turnover of the sums allegedly due; and the Custodian then brought suit in the District Court, against both Taylor, as president of ASCAP, and Propper, to secure the turnover and a declaration that Propper had no right to the fund. The court there held that Propper, as a temporary receiver appointed under §977-b of the N. Y. Civil Practice Act, had no title or interest in the funds held by ASCAP, that the Executive Order prohibiting the unlicensed transfer of property owned by Austrian nationals was effective prior to the appointment of Propper as permanent receiver, and that he could receive no title to these assets by virtue of such appointment, the prohibition being applicable alike to transfers of a judicial character and those of a voluntary nature. *Markham* v. *Taylor, supra.* Hence the court entered the summary judgment against Propper from which the earlier appeal was taken.

After the dismissal of this appeal and the filing of the stipulation between plaintiff and ASCAP settling the amount due as between them, the district judge at a hearing on pre-trial determined that there was no further obstacle to final judgment, and therefore entered summary judgment for plaintiff. On this appeal Propper is of course confined to his claims of law, but he asserts that the stipulated amount represents a sum much less than that actually owed by ASCAP to AKM.

The first question is therefore whether Propper's appointment as temporary receiver before the Executive freezing order gave him such title to the chose in action in question as to prevent its seizure by the Custodian. The [fol. 44] authority for the appointment, N. Y. Civil Practice Act, §977-b, is a statute passed in 1936 for the appointment of "Receivers to liquidate local assets of foreign corporations." It authorizes the appointment of a temporary receiver "pending the determination of the action"; it specifies the mode of service of process on the defendant; and it provides for the entry of judgment and the appointment

of a permanent receiver upon default of the defendant, or after trial. Judge Coxe held that this section did not depart from the general New York rule, applicable to chancery as well as statutory receiverships, namely, that a temporary receiver does not obtain title by virtue of his appointment. We agree.

The New York courts have consistently ruled that a temporary receiver *pendente lite* does not obtain title to the property, but has only a right of possession. *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Herring* v. *New York, L. E. & W. R. Co.*, 105 N. Y. 340, 12 N. E. 763; *Decker* v. *Gardner*, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; *Stokes* v. *Hoffman House*, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870; *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488, 64 N. E. 194; *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. S. 101; *In re French*, 181 App. Div. 719, 168 N. Y. S. 988, affirmed 224 N. Y. 555, 120 N. E. 863. See N. Y. General Corporation Law, §§162, 163, 168. Since these precedents show such general understanding in New York of the restricted rights of a temporary receiver, we should look for clear statutory language to disclose a different intent for this one situation here. None is to be found in §977-b of the N. Y. Civil Practice Act. Nowhere in that statute is the temporary receiver in terms given the title, as appellant contends. Indeed, the only provision spelling out what the temporary receiver takes is subd. 4 of the section, which states that he "shall take, receive and reduce to his possession any and all assets, [fol. 45] credits, choses in action and property" in the state of New York. This, as we have seen, is no more than what the chancery receiver took in accordance with the well-settled principles of New York law.

Appellant, however, relying largely on subd. 12, tries to establish that the temporary receiver has the powers of a permanent receiver and hence takes title to the property. In its entirety that subdivision reads: "Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York." Appellant reasons that "any receiver" includes a temporary one and accordingly that he has the powers of a permanent receiver. We think his argument proves too much. Subd. 4 defines the temporary receiver's powers and states that he can reduce the

property to possession. It does not even suggest that he takes title. Clearly there would be little purpose in spelling out restricted powers there if the later subdivision was intended to make them unlimited. To do so would set at naught the distinction between a temporary and permanent receiver so obviously intended by the language of the statute. More readily the quoted language should be read to mean that a temporary receiver under this provision takes the usual powers of other temporary receivers in New York.

Appellant offers a further variant of this argument based upon his contention that the final judgment whereby he was made permanent receiver established that AKM had ceased to exist at the time of his initial appointment as temporary receiver. From that he concludes that the property vested by the order appointing him temporary receiver and not by the final judgment entered in that action. He offers no compelling argument as to why his appointment as permanent receiver should be given such retroactive effect. Nor does he cite any case that supports his view. [fol. 46] We have found none; nor do we think the result desirable. The decisive point of time to consider in determining whether Propper had title to AKM's assets in the state of New York was June 14, 1941, when the Executive Order forbade any unlicensed transfer of its property. At such time, and under the appointment he then had, Propper's only power was to reduce the assets to possession. In a different context we have recently declared our unwillingness to give retroactive effect to state law so as materially to alter rights accruing to the federal government under a federal statute. *Daine* v. *C.I.R.*, 2 Cir., June 2, 1948. We think the reasons for refusing retroactivity are the more compelling here. For if appellant's position is sound, then the right of the Custodian to an enemy alien's property must wait upon the litigation by private persons in state courts—litigation that might well be collusive and certainly would be protracted.

Appellant's other main argument is that the regulation of the Treasury Department, General Ruling No. 12, parag. (4), April 21, 1942, 7 F. R. 2991, allows a transfer of property by the courts. Thus his appointment as permanent receiver on September 29, 1941, would accomplish the transfer of AKM's assets to him. The Treasury Department, in Public Circular No. 31, issued August 2, 1946, 11 F. R. 8351, in interpreting that regulation bluntly states that "the judi-

cial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property." We agree with this interpretation. The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property. There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings. Such would negate the executive and legislative inten-
[fol. 47] tion. Appellant has cited *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726, in support of his position. But the problem is not the construction of a state statute in this aspect of the case, and accordingly interpretation of the ruling by the state court is not decisive. For the reasons stated we are of the opinion that the prohibition of unlicensed transfers as contained in Exec. Order 8389 is universal. The critique of this New York case in Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398, is persuasive.

On this appeal Propper makes an additional contention, not made in his earlier appeal, but undoubtedly stimulated by certain expressions found in our opinions as originally filed, though omitted from the final opinions refiled upon denial of rehearing. This is that the interpretation of N. Y. Civil Practice Act, §977-b, is for the New York courts, and that this action should be dismissed or stayed pending the obtaining of a state ruling, in reliance upon cases such as *Musser* v. *State of Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496. We do not think, however, that this is the occasion for that somewhat drastic course. It seems designed for and limited to cases involving serious and doubtful questions, often of a constitutional nature, involving the inner economy or the sovereign rights of a state where federal action, if not circumspect, may upset the delicate balances necessarily inherent in a federal system of government. We should doubt if a mere interpretation of a procedural statute, easily corrected if erroneous without noticeable impact upon the public activities of the state, would show such a case at best. Certainly it would seem not to do so when our interpretation simply follows the usual state construction in a more or less routine manner where the issue is not doubtful. Moreover, this case

involves also unusually important federal rights, whose con- [fol. 48] struction is at once more difficult and more far-reaching than any question of state's rights here involved. Such federal ruling as to wartime powers of the national government is not of the sort which can properly await the long delays found a necessary concomitant to the seeking of state guidance in special cases. We therefore deny appellant's request. See *Meredith* v. *City of Winter Haven*, 320 U. S. 228, *Markham* v. *Allen*, 326 U. S. 490.

Appellant's further jurisdictional objection (and this he has stressed from the beginning) is that the subject matter of the controversy is in the custody of the state court, thus excluding federal power. This is answered by pointing to the fallacy of the assumption that, even if such custody be considered to exist, it is decisive. The federal court can resolve the claim of the Custodian and those of other claimants to property in the custody of a state court; and often, if not generally, it is important and necessary that the issue be settled promptly and decisively. *Markham* v. *Allen*, *supra*; *Clark* v. *Tibbetts*, 2 Cir., 167 F. 2d 397. Indeed, the New York courts have expressly so held. *Application of Alien Property Custodian of U. S.*, 270 App. Div. 732, 60 N. Y. S. 2d 897. See *In re Sielcken's Estate*, 167 Misc. 327, 3 N. Y. S. 2d 793; *Stern* v. *Newton*, 180 Misc. 241, 39 N. Y. S. 2d 593. And where, as here, it appears that there is left no adverse claim before the court, judgment for the plaintiff necessarily results.

Affirmed.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of August, one thousand nine hundred and forty-eight.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

TOM C. CLARK, Attorney General, etc., Plaintiff-Appellee,

v.

DEEMS TAYLOR, as President of ASCAP, etc., Defendant-Appellee,

HENRY M. PROPPER, Receiver, etc., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk, by A. Daniel Fusaro, Deputy Clerk.

[fol. 50] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Tom C. Clark, Attorney General, etc., v. Deems Taylor, etc., & Henry M. Propper, etc. (294.) Judgment. United States Circuit Court of Appeals: Second Circuit. Filed August 3rd, 1948. Alexander M. Bell, Clerk.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 52] SUPREME COURT O

ORDER ALLOWING CERTIOR

The petition herein for a
States Court of Appeals for
limited to questions 1 and
the writ.

And it is further ordered
the transcript of the proceed
the petition shall be treated
such writ.

The Chief Justice took n
decision of this application.

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ORARI—Filed January 3, 1949

a writ of certiorari to the United
or the Second Circuit is granted.
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SUPREME COURT, U S

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITIONER'S BRIEF IN SUPPORT OF APPLICATION

A. WALTER SOCOLOW
Attorney for Petitioner
580 Fifth Avenue
New York 19, N. Y.

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Supreme Court of the United States

OCTOBER TERM, 1948

No.

HENRY M. POPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND PETITIONER'S BRIEF IN SUPPORT OF APPLICATION

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

A final judgment based upon a stipulation of settlement was entered in the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit, in favor of the Alien Property Custodian's Successor, as plaintiff, against Deems Taylor, as President of the American So-

ciety of Composers, Authors and Publishers (ASCAP), one of the defendants in this action. Recovery was claimed under Vesting Order 2097 of a debt due under a written contract for royalties between ASCAP and an Austrian corporation known as AKM, a licensor of performing rights of copyrighted Austrian music in a manner similar to ASCAP's business functions in this country.

For nearly five years prior to the commencement of the instant action, Petitioner had claimed the debt as Receiver of AKM pursuant to §977-b of the New York Civil Practice Act. This statute authorizes a special proceeding *in rem* with respect to assets in New York of foreign corporations whose charters have been suspended, annulled or abrogated and provides for acquisition, liquidation and distribution of such local assets for the benefit of local creditors (R. I. fols. 115-143). This aim is achieved through a statutory receiver who, by the statute, is endowed with title to such assets.

On June 12, 1941, by order of the Supreme Court of New York, Petitioner was appointed temporary receiver of AKM's New York assets, and on September 29, 1941, his appointment was made permanent by final judgment. In the interval, on June 14, 1941, Executive Order 8389 (5 Fed. Reg. 1400) was extended by the President to property in the United States belonging to Austrian nationals (Exec. Ord. 8785, 6 Fed. Reg. 2897).

The Alien Property Custodian, by Vesting Order 2097, published December 7, 1943 (8 Fed. Reg. 16463) vested the right, title and interest of AKM to certain property in the United States and purported thereunder to claim the interest of AKM in the contested chose in action against ASCAP which Petitioner, as receiver, had been litigating intensely in the New York courts since July, 1941. However, the Custodian stood by and did nothing with respect

thereto, until the institution of the instant action on April 22, 1946, when he sought to declare that Petitioner had no rights to recover royalties due from defendant ASCAP.

The District Court granted the Custodian's motion for summary judgment and dismissed Petitioner from the case (*Markham v. Taylor*, 70 F. Supp. 202). On appeal, such judgment was held not to be final and the appeal therefrom was dismissed (*Clark v. Taylor*, 163 F. 2nd 940).[1] Final judgment was then obtained upon the stipulation of settlement between plaintiff and ASCAP (R. II, fols. 10-18), over Petitioner's objections (R. II, fols. 19-33) and on appeal the Court of Appeals affirmed such judgment on August 3, 1948 (169 F. 2d 324).

It was conceded by the Custodian that Vesting Order 2097 would have been ineffectual to seize the ASCAP debt as against Petitioner's title as Receiver, except for the impact of Executive Order 8389. The Custodian contended (a) that Petitioner's appointment as Temporary Receiver did not endow him with title under §977-b; and (b) that Petitioner's appointment as Permanent Receiver would have vested him with title to AKM's assets but that Executive Order 8389 prevented this without a Treasury Department license. No such license has been issued. Moreover, Treasury Department regulations automatically require denial of licenses where the Alien Property Custodian makes claim to the property involved (Public Circular No. 31, August 2, 1946, 11 Fed. Reg. 8351).

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[1] The record on the dismissed appeal was made a part of the record on the appeal below (R. II, fols. 97-101). References herein to the record are made as follows:

Record on original dismissed appeal: (R. I).
Record on subsequent review: (R. II).

The judgment below is predicated upon the following findings:

(a) Petitioner, by his order of appointment as Temporary Receiver, acquired no such title to AKM's assets (the chose in action against ASCAP) as would defeat a *subsequent* Treasury Department freeze order (Executive Order 8389) prohibiting the transfer of enemy funds; and

(b) Petitioner's appointment as Permanent Receiver after the effective date of Executive Order 8389 did not bar the Custodian's claim.

(c) Vesting Order 2097 was therefore effective to seize the ASCAP debt unencumbered by the New York statutory receivership proceedings.

The Courts below supported such findings upon the admittedly independent federal interpretation of the nature and extent of Petitioner's rights as temporary and permanent receiver of AKM's assets under said New York statute.

While the New York Court of Appeals has not yet been called upon to define or construe the particular title of temporary and permanent receivers under its special statute, which local construction, if made, would be binding upon the federal courts, nevertheless there was a sufficient and adequate construction of Petitioner's rights and statutory title to the contested chose in action against ASCAP by the New York Supreme Court (*Propper* v. *Taylor*, 186 N. Y. Misc. 70, 72).

The New York Supreme Court held:

> "The title which C. P. A. Section 977-b confers upon the plaintiff is not a beneficial title but a title in trust for the Austrian corporation and its creditors" (p. 71).

and at page 73:

> "* * * without attempting any definite determination as to the effect of the order by which the Alien Property Custodian has sought to vest this cause of action in himself, I think it is at least safe to say that if the Custodian takes the cause of action at all, he must take it in the plight and condition in which it was when he attempted to take it; and as applied to this case that means that he takes it as one upon which a suit already had been brought in this court and in which rights by way of an attorney's lien and possibly otherwise have been acquired by the institution of the action."

The lower court decision on this point was affirmed by unanimous decision of the New York Appellate Division, First Department, the highest state court having jurisdiction to hear appeals from intermediate orders (270 App. Div. 890).

The courts below refused to dismiss or stay this Federal action pending the interpretation by the New York courts of the state legislation on the ground that it doubted that this action would affect the inner economy or sovereign rights of New York. The Court said:

> "Moreover, this case involves also unusually important federal rights, whose construction is at once more difficult and more far-reaching than any question of state's rights here involved. Such federal ruling as to wartime powers of the National Government is not of the sort which can properly await the long delays found a necessary concomitant to the seeking of state guidance in special cases" (pp. 1942-3).

The courts below also struck down Petitioner's basic jurisdictional objections that (a) the subject matter of the controversy is in the custody of the New York court and had been so for two and one-half years prior to the publication of Vesting Order 2097; (b) the rights of the Custodian are fully protected in the New York receivership proceedings, and (c) the New York statute is not repugnant to any subsequent Executive action. The Court of Appeals brushed aside the entire *ante-bellum* state receivership proceedings and the state court's custody and control of the *res*, as well as the constitutional rights of A.K.M.'s creditors, attorneys and others not parties to this action, with the following generality:

> "The federal court can resolve the claim of the Custodian and those of other claimants to property in the custody of a state court; and often, if not generally, it is important that the issue be settled promptly and decisively" (p. 1943).

Questions Presented

1. Did Petitioner's appointment as temporary statutory receiver, on June 12, 1941, endow him with title by operation of law to the debt in question which was good as against the Custodian's subsequent Vesting Order?

2. If not, did the September 29, 1941 judgment appointing Petitioner permanent statutory receiver endow him with title to the debt in question as of the date of his appointment as temporary statutory receiver which was good as against the subsequent Vesting Order?

3. If not, did the judgment appointing Petitioner permanent statutory receiver endow him with title to the debt

in question which was good as against the subsequent Vesting Order, notwithstanding that the scope of Executive Order 8389 had been extended to Austrian nationals on June 14, 1941?

4. Did the federal court properly effectuate the Custodian's attempted seizure of the debt in question and was it competent to nullify the prior seizure of the same debt by the state court in the statutory receivership proceedings, in face of the settled rule that neither a state nor a federal court may interfere with property in the custody or control of the other?

5. Did the lower courts refuse full faith and credit to the proceedings and judgment of the state court (which had adjudicated title to the debt in question to be in Petitioner as statutory receiver) in violation of the full faith and credit clause of the Constitution?

6. Did the Vesting Order, as enforced by the courts below, unlawfully deprive citizens of antecedent liens against, and rights in, the debt in question without the opportunity to be heard, in violation of the due process clause of the Constitution?

7. Was not the Custodian estopped from asserting rights paramount to, and exclusive of, Petitioner's right to the debt in question under the New York statute in circumstances where Petitioner as receiver had been carrying on intense litigation thereon against the debtor for about five years before the Custodian took any affirmative action with respect thereto and where Petitioner had already performed valuable services and incurred expenses for court costs and attorneys' fees?

Specific Errors

(1) The Court of Appeals erred in holding that Executive Order 8389 prohibited the creation of interests in property by judicial process.

(2) The Court of Appeals erred in holding that its determination did not conflict with the custody of the *res* and the control thereof as vested in the Supreme Court of the State of New York by the New York statute and the receivership proceedings thereunder.

(3) The Court of Appeals erred in failing to give full faith and credit to the New York statute and the judgment and the proceedings in the state court.

(4) The Court of Appeals erred in resolving claims as to the ownership of the entire gross receivership estate which was in the possession and custody of the New York court, instead of resolving claims to the distributive share and beneficial interest therein which may be payable to A. K. M.

(5) The Court of Appeals erred in depriving local citizens, creditors of A. K. M. (who instituted the New York receivership proceedings) and Petitioner's attorneys, of their property rights in and liens upon the chose in action without due process of law when such citizens were not made parties to the instant action.

Reasons Relied on for Allowance of Writ

This action, instituted by the Alien Property Custodian, brings into sharp focus the legal effect of Executive Order 8389 upon long pending earlier judicial process in state courts whereby transfer of property by such courts is claimed to be interdicted by federal administrative regu-

lations and interpretations of said order. The impact upon state judicial systems and state legislative action of Executive Order 8389, by subsequent administrative fiat, notwithstanding the state's exercise of its sovereign powers in a manner fully consistent with national policy, creates needless friction between federal and state rights which indubitably merits the consideration and decision of the Supreme Court of the United States.

The New York courts have interpreted the legal effect of Executive Order 8389 as not impairing the state's judicial system and have reserved to the federal domain the necessary sanction of the *payment* of enemy funds without interfering with the prosecution of private actions involving such property in the state's courts.

Leeds v. *Guaranty Trust Co.*, 297 N. Y. 1019, affg. 272 N. Y. App. Div. 909, affg. 65 N. Y. Supp. 2d 431;
Singer v. *Yokohama Specie Bank*, 293 N. Y. 542;
Comm. for Polish Relief, Ltd. v. *Banco Nationala Rumaniei*, 288 N. Y. 332, affg. 262 N. Y. App. Div. 543, affg. 176 N. Y. Misc. 1070;
Patino v. *Patino*, 186 N. Y. Misc. 381;
Metallo-Chemical Corp. v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596;
R. & L. Goldmuntz Sprl v. *Fischer*, 54 N. Y. Supp. 2d 635, 640.

While this Honorable Court has, in *Markham* v. *Allen*, 326 U. S. 490, permitted the federal courts to decide conflicting claims to property in the possession and custody of state courts, it dealt solely with the distributive and beneficial interests of aliens to such property after payment of local claims and administration expenses and was

careful to note that such function of the federal judiciary does not and shall not interfere with, disturb, affect or usurp the normal and orderly control and administration of such property by the state courts.

In the instant action, the courts below, by the judgment sought to be reviewed, have, under the guise of resolving claims and in the interests of unwarranted speed, proceeded to wrest control of all of the property being administered by the New York court and in its custody and effectively destroyed the entire *ante-bellum* state receivership proceedings instituted for the specific statutory purpose of liquidating local assets of defunct foreign corporations for the benefit of local creditors. There is thus here involved a denial of full faith and credit to the statutes and judicial proceedings of the State of New York, in violation of the United States Constitution.

The pleadings in this action (R. I, fols. 102-112) and the evidence in the record (R. I, fols. 230-3, 247-273, 392; R. II, fols. 24-5) indicate conclusively that the local creditors of A. K. M. instituting the receivership action in the New York court, as well as Petitioner and his attorneys who have acquired statutory liens on and rights to the property in the possession of the State court, were not made parties to this action, were ignored by the courts below, and have been deprived of their property without due process of law in violation of the United States Constitution.

The grave constitutional questions here presented and the necessity of resolving the conflict between federal and state decisions as to the effect of Executive Order 8389 upon the operation of the states' legal machinery are new, novel and important federal and local questions which have not been, but should be, settled by this Honorable Court, whose power of supervision should be exercised over the courts below (Supreme Court Rule 38 (5) (b)).

This Court is respectfully solicited to review the judgment below because of (a) its wide and far-reaching effect; (b) the friction thus created between federal and state systems of our government; (c) the misconstruction of *Markham* v. *Allen*, 326 U. S. 490; (d) the invasion of constitutional rights of persons not parties to the instant action; and (e) the universal importance of the fundamental questions here presented, the prompt settlement of which by this Court will be in the public interest.

The mandate of the Court of Appeals was entered on the 3rd day of August, 1948.

WHEREFORE, your petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the Court of Appeals for the Second Circuit commanding said Court to certify and send to this Honorable Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its Docket No. 21018, Case No. 294, October Term, 1947, "Tom C. Clark, Attorney General, as successor to the Alien Property Custodian, Plaintiff-Appellee, *versus* Henry M. Propper, as Receiver of the property and assets within the State of New York of AKM, Defendant-Appellant," to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Honorable Court; and for such other and further relief as may be just and proper.

Dated, October 27, 1948.

A. WALTER SOCOLOW
Attorney for Petitioner
580 Fifth Avenue
New York 19, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian.

PETITIONER'S BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Opinions Below

The opinion herein by the United States Court of Appeals for the Second Circuit is officially reported in 169 F. 2d 324. The District Court opinion is officially reported in 70 F. Supp. 202 *sub nom. Markham* v. *Taylor.*

Preliminary Statement

This action was instituted on April 22, 1946, by the Alien Property Custodian under his Vesting Order 2097, published December 7, 1943 (8 Fed. Reg. 16463, R. I. fols. 334-343), to recover a chose in action against defendant ASCAP which Petitioner as receiver, under Section 977-b of the New York Civil Practice Act (R. I. fols. 115-143),

had been litigating against ASCAP in the New York Supreme Court since his appointment as temporary receiver by that Court on June 12, 1941 (R. I. fols. 145-152). Vesting Order 2097 referred to property in the United States of AKM, an Austrian corporation.

The title to this chose in action against ASCAP was attacked by the Custodian by naming Petitioner as a co-defendant in the instant action and in seeking an adjudication that Petitioner had no rights thereto, although Petitioner had been prosecuting bitterly contested litigation in the New York Supreme Court against ASCAP thereon for almost five years prior to the commencement of this suit.

The Custodian relied upon Executive Order 8389 (5 Fed. Reg. 1400, as amended by 6 Fed. Reg. 2897) to defeat petitioner's claim of title under the New York statute and receivership proceedings, by contending that Executive Order 8389 prohibited the transfer of blocked property by judicial process and that Petitioner's litigation against ASCAP in the New York Supreme Court was therefore meaningless and should be disregarded.

In determining the title of Petitioner to the asset, the Courts below felt it necessary to overcome the express language of subd. 49 of §977-B, which provides that title to all assets within the State of New York "shall immediately vest in the receiver upon the making of the *order* appointing him" (R. I. fol. 135).

Since Petitioner's title dated from his appointment as temporary receiver on June 12, 1941, Executive Order 8389, extended to the property of Austrian nationals on June 14, 1941, would be inapplicable. Notwithstanding the express provisions of the special New York statute, the Courts below undertook independently to construe it and to hold that, as temporary receiver, Petitioner obtained merely the right to possession of the assets but that title

did not vest in him until the judgment appointing him permanent receiver on September 29, 1941. Except for the impact of Executive Order 8389, Vesting Order 2097 admittedly would have been ineffectual to seize that asset from Petitioner as statutory receiver. The effect of the intervening Executive Order 8389 upon the judicial process of the State of New York is therefore here involved.

POINT I

Petitioner's title as temporary receiver or as permanent receiver of AKM under Section 977-b was not prohibited by Executive Order 8389.

The New York Courts have considered the effect of Executive Order 8389 upon the local judicial system and have held that the purpose and effect thereof, being to control the use and disposition of alien property in the United States for purposes inimical to national welfare, did not prohibit the transfer of property by judicial process to persons not within the purview of the Trading with the Enemy Act and the executive orders thereunder.

The New York Courts have held that the prohibition extended only to the payment of alien funds and not to the transfer thereof by judicial process.

Leeds v. *Guaranty Trust Co.*, 297 N. Y. 1019, affg. 272 App. Div. 909, affg. 65 N. Y. Supp. 2d 431;
Singer v. *Yokohama Specie Bank*, 293 N. Y. 542;
Comm. for Polish Relief, Ltd. v. *Banco Nationala Romaniei*, 288 N. Y. 332, affg. 262 App. Div. 543, affg. 176 Misc. 1070;
Patino v. *Patino*, 186 Misc. 381;

Metallo-Chemical Corp. v. *Banque Transatlantique S. A.*, 188 Misc. 596;

R. & L. Goldmuntz, Sprl. v. *Fischer*, 54 N. Y. Supp. 2d 635, 640.

As pointed out by the New York Court of Appeals in *Commission for Polish Relief, Ltd.* v. *Banca Nationala Rumaniei* (*supra*), the position of the United States on this point was as follows:

> "As *amicus curiae*, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. See *United States* v. *Pink*, 315 U. S. 203."

The purpose of §5-b of the Trading with the Enemy Act and Executive Order 8389 promulgated thereunder, was solely to enable the Executive to screen transactions involving frozen funds to determine whether they were legitimate and to suspend the consummation of any which were not. §5-b did not void transfers by judicial process and was not intended to do so. Executive Order 8389 has no expropriating effect and should not thwart the operation of the laws of New York or the orderly administration of the local courts.

Treasury Department, General Ruling 12, issued long after petitioner's appointment as permanent receiver, cannot be given retrospective force to void petitioner's previously acquired rights to the asset involved. *Miller* v. *United States*, 294 U. S. 435, 439.

§5-b was enacted in 1936 for the specific purpose of liquidating New York assets of defunct foreign corporations at the instance of local creditors (Memo. of Gov-

ernor Lehman June 8, 1936, filed with Senate Bill Int. No. 922, Pr. 1623).

Proceedings under Section 977-b are actions *in rem*.

Meyer v. *Petrograd Metal Works*, 256 N. Y. App. Div. 1077; *app. den.* 281 N. Y. 887;
Oliver v. *American-Oriental Banking Corporation*, 252 N. Y. App. Div. 212; affd. 277 N. Y. 588.

The special statute was designed to vest jurisdiction in the New York Court and title to the local *res* in the temporary receiver appointed by order of the Court, in specific situations where foreign corporations had ceased to exist.

Sub. 18 of §977-b therefore expressly provides that title to the *res*

> "shall immediately vest in the receiver upon the making of the *order* appointing him."

This is further emphasized by Subd. 12 of §977-b which provides

> "*Any receiver* appointed pursuant to this *section* shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and *trustees* by the laws of the State of New York" (R. I. fol. 126).

The appointment of a temporary receiver was *mandatory* under Subd. 4 of the Statute (R. I. fol. 118).

The Courts below in their independent construction of §977-b nevertheless held that "title" referred to the permanent receiver (who is appointed by "*judgment*" under New York procedure) rather than the temporary receiver (who is appointed by "*order*" under local practice). Sup-

port for this construction was claimed under the general common law rule that temporary receivers *pendente lite* obtain only a right of possession rather than title to property. A receiver's title is derived by operation of law (*White* v. *Ewing*, 158 U. S. 35, 40).

1 Clark on Receivers (2d Ed.), §344, defines the title of temporary receivers at common law as follows:

> "All the title, if any, which remains in the individual or corporation is merely the formal legal title which is held by it in trust for the receiver, which title it could be compelled by the court at any time to convey to the receiver for the purposes of the trust. The receiver must therefore have the equitable title because the court has imposed on the property an equitable trust. And this is a qualified title because it is the subject of an interlocutory decree."

The real custodian of property in the hands of a receiver is the court appointing him, since the receiver does not represent justiciable rights of parties to litigation of which he is receiver, but is concerned only with protection of the property in his hands as such.

> *U. S. Mortgage and Trust Co.* v. *M. K. T. Railway Co.*, 269 Fed. 497; *cert. den.* 256 U. S. 689;
> *Mosher* v. *Supreme Order*, 34 N. Y. Supp. 816;
> *Becker* v. *Torrance*, 31 N. Y. 631;

Moreover, statutory receiverships which are designed to cover special situations do depart from common law rules, as in §977-b, which specifically provides that

> "any receiver * * * shall have all the powers and duties * * * as are possessed by and conferred upon

* * * *trustees* by the laws of the State of New York" (subd. 12, R. 1., fol. 126).

As was said specifically of Petitioner's title in the action instituted by him as statutory temporary receiver against ASCAP,

> "The title which C. P. A. Section 977-b confers upon the plaintiff is not a beneficial title but a title in trust for the Austrian corporation and its creditors."

Propper v. *Taylor*, 186 N. Y. Misc. 70, 71.

Even if the courts below were correct in assuming that Petitioner's statutory title was obtained upon the judgment appointing him permanent receiver on September 29, 1941, such title should be given retroactive effect under the statute and at common law to the date of the order appointing Petitioner as temporary receiver. To do otherwise would serve merely to defeat the purpose of the legislation and to nullify the acts of the temporary receiver under the statute in seeking to recover choses in action which are among the assets expressly described in Subd. 19 of §977-b. In this instance Petitioner, as temporary receiver, sued ASCAP in the New York courts on the chose in action by suit commenced July 29, 1941 after making his demand on July 9, 1941 (R. 1. fol. 286). Petitioner's authority to maintain such suit was unsuccessfully contested and his complaint against ASCAP upheld in the local courts; and Petitioner's right to maintain such suit as statutory temporary receiver was confirmed by the New York courts (*Propper* v. *Buck*, 178 N. Y. Misc. 76; affd. 263 N. Y. App. Div. 948).

Federal policy does not require nullification of local law or judicial process for the protection of the Custodian, even if receiver had no title on June 12, 1941. The Custodian would have a claim for surplus assets in the hands of Petitioner after payment of administration expenses and domestic claims allowed in the New York receivership proceedings.

United States v. Pink, 315 U. S. 203, 210, 213;
Guaranty Trust Co. v. Bell, 46 N. Y. S. 2d. 137.

In *Walling v. Miller*, 108 N. Y. 173, the New York Court of Appeals upheld a receiver's rights to property as against the rights of prior attachment creditors effected before his appointment. The Court said (p. 177):

> "The lien of the execution was not destroyed by the appointment of a receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the Court which appointed the receiver, and the property could not be taken out of the possession of the receiver and sold upon the execution without leave of the Court. The execution creditor could bring his lien to the attention of the Court in which the receiver was appointed and ask to have the execution satisfied out of the proceeds of the property."

POINT II

Even if the petitioner had acquired no title, the property in question is in the exclusive custody, possession and jurisdiction of the New York court and is subject to exclusive, orderly administration and control by it, free from interference by the Custodian or any proceedings in the Federal courts.

The fact that an officer of the United States seeks control of assets in the custody of a state court does not affect the jurisdiction of the state court and its right to administer such property.

In *Meyer v. Petrograd Metal Works*, 256 N. Y. App. Div. 1077 (*app. den.* 281 N. Y. 887), the title of the United States, as assignee, pursuant to an international treaty, to local assets of a Russian corporation, was held subordinate to that of local creditors and not to affect even a subsequent receivership action instituted under §977-b. The Court there said, at p. 1078:

> "* * * The proceeding, instituted in accordance with the provisions of Section 977-b of the Civil Practice Act, is in rem for the purpose of distribution of the assets of a foreign corporation which had been nationalized and may not be vitiated because of the status of the United States as claimant of the assets. It may, without impairment of its rights, prosecute its claim before the receiver. United States v. Bank of New York & Trust Co., 296 U. S. 463, 480."

In *United States v. Bank of New York & Trust Co.*, 296 U. S. 463, the United States, claiming title under the same International Treaty of 1933, sought by action in the Dis-

trict Court to interfere with and affect the property of a Russian corporation then under administration under §977-b in the New York Supreme Court precisely as in the case at bar. The Supreme Court of the United States unanimously denied such right on the part of the United States, notwithstanding the claim of title under the Treaty of 1933, stating at pp. 480-1:

> "In the instant case not only had the state court first acquired jurisdiction, but there are numerous persons whose claim in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States they are entitled to be heard and they are indispensable parties to any proceedings for the disposition of the property involved. * * * The adverse claimants are parties to the respective proceedings in the state court and from every point of view the principles governing the convenient and orderly administration of justice require that the jurisdiction of the state court should be respected.
>
> "* * * We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if *it prosecuted its claim in the appropriate forum where the funds are held.*" (Italics supplied.)

It should be noted that in the foregoing cases, the title of the United States was derived under the Treaty of 1933 which, under the Federal Constitution, is part of "the supreme law of the land." *(U. S. Const.* Art. VI, Par. 2. If title acquired pursuant to "the supreme law of the land" is subordinate to that of the rights of local creditors it necessarily follows that the rights of the Alien Property

Custodian, which are derived from a Congressional enactment, are likewise necessarily subordinate to the rights of AKM's local creditors and of Petitioner, under §977-b. This is especially true where, as here, the Trading with the Enemy Act and the Executive Orders thereunder are not confiscatory but merely authorize the Executive to seize alien property solely as a provisional measure of defense to prevent such property from coming into enemy hands during the war. Certainly, it cannot be said that property in the possession and jurisdiction of the New York Supreme Court is in any danger of falling into enemy hands (R. I. fols. 151, 177).

The governing principle, now well established, is of universal application, as shown by the number of other decisions of the Supreme Court of the United States collected in *City of New York* v. *Darlington*, 177 N. Y. Misc. 87, 90.

In *Markham* v. *Allen*, 326 U. S. 490, the Supreme Court expressly reiterated the principle previously laid down by it in *Bank of New York & Trust Co.* (*supra*), stating:

> "* * * * a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court; *Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195, 196, and cases cited; *United States* v. *Bank of New York & Trust Co.*, *supra*, 296 U. S. 477, 478."

Markham v. *Allen* involved disputed claims to *distributive shares* of a California decedent's estate. This Court upheld jurisdiction of the federal courts to resolve such disputed claims. Clearly, however, the gross estate and the administration thereof by the California court were not there involved.

As pointed out in *Clark* v. *Allen*, 331 U. S. 503, the Custodian merely sought "a determination that they (California heirs at law) have no interest in the estate and that he was entitled to the entire *net estate after payment of administration and other expenses*" (pp. 506-7).

The instant action attempts to go much farther by claiming the *entire gross receivership assets* in the jurisdiction of the New York Court. The judgment sought to be reviewed in sanctioning such extended claim of the Custodian jettisons the general rule and violates the doctrine of *Markham* v. *Allen* (*supra*). The scope of the Custodian's contention is exemplified by the fact that he unwarrantedly seeks to deprive Petitioner, his attorneys and local creditors of their respective rights in and liens upon the receivership asset lawfully acquired by them prior to Vesting Order 2097, without making them parties to the instant action (R. I. fols. 102-112, 181-9, 230-3, 243, 248-73, 392, 402-3). In so doing, and by the judgment of the courts below, such citizens have been deprived of their property without due process of law in violation of their constitutional rights. A plainer deprivation of property rights without compensation or due process of law can hardly be imagined.

As pointed out by this Court in *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, at p. 480:

> "In the instant cases not only had the state court first acquired jurisdiction, but there are numerous persons whose claims in relation to these funds are in course of adjudication. Whether or not their claims are valid against the claim of ownership by the United States they are entitled to be heard and they are indispensable parties to any proceeding for the disposition of the property involved."

Can it be doubted, for instance, under the rule of the case just quoted, that Sobotka, who brought the action in the State Court under §977-b and obtained the order appointing Petitioner temporary receiver therein *prior* to the effective date of Executive Order 8389, and who subsequently secured the final judgment in said action, is a necessary party to this action? He certainly, under our law, is entitled to the protection of due process and due compensation before any rights secured by him in such action may be taken away from him. This is undoubtedly true at least as to his rights secured *prior* to the effective date of Executive Order 8389, even if they amounted to nothing more than the right to have the property in the custody and possession of the New York Court through its Receiver. Obviously, the complete nullification of all statutory proceedings in the State Court action from the very beginning thereof cannot be lawfully effected without his presence, as is done by the judgment below.

Moreover, in usurping the jurisdiction of the state court over the gross assets of the receivership, the courts below failed to give the New York statute and receivership proceedings the full faith and credit to which they are entitled under the Constitution.

As was pointed out in *Hirson v. United States Corporation, et al.*, 263 N. Y. App. Div. 646, affd. 289 N. Y. 564, predicated on Supreme Court decisions:

> "As the Delaware receiver's title flowed from the statutes of that State and not merely from a decree in chancery of the Delaware courts, *such title must be afforded full faith and credit as an attribute of a public act or judicial proceeding of a sister State. Relfe* v. *Rundle, supra; Converse* v. *Hamilton*, 224 U. S. 243; *Clark* v. *Willard, supra; Martyne* v. *American Union Fire Insurance Co.*, 216 N. Y. 183." (Italics supplied.)

In *Oakes* v. *Lake*, 290 U. S. 59, the same result was reached as in *Converse* v. *Hamilton*, 224 U. S. 243. Referring there to its former decision in *Converse* v. *Hamilton*, this Court pointed out that the receiver suing in the *Hamilton* case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a quasi assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the Federal Constitution.

To the same effect, see *Clark* v. *Willard*, 292 U. S. 112, 120-121; *Pacific Improvement Co.* v. *Pittsburgh, S. & R. Co.*, 33 F. (2d) 505, *cert. den.* 280 U. S. 585.

POINT III

Vesting Order 2097 can operate only to seize property of AKM as of the date of issuance and cannot affect the vested rights of third parties lawfully acquired long prior thereto.

Vesting Order 2097 cannot operate retroactively so as to affect the vested rights of third parties. "The rights of third parties were not affected by the vesting order." *United States* v. *The Antoinetta*, 153 F. (2d) 138, 143; *Magg* v. *Miller*, 296 Fed. 973.

As was said in *People by Beha, Superintendent of Insurance*, 256 N. Y. 177 (cert. den. 284 U. S. 687), by Judge Kellogg, writing for the New York Court of Appeals, at pp. 187-8:

> * * * Surely the demand could give rise to no greater property right. Nor, indeed, could the Alien

> Property Custodian under such a demand, * * * by capture change the character of the enemy's right as obligee. * * * Such a demand neither enlarges nor contracts the rights seized.' Per Learned Hand, J., in *Kahn* v. *Garvan* (D. C.), 263 F. 909, 912. * * * in other words, the custodian by his demand takes whatever title the enemy has; he takes and acquires no greater right."

This rule is well settled and cannot be doubted.

United States v. *The Antoinetta*, 153 F. (2d) 138, 143;

Sutherland v. *Selling*, 16 F. (2d) 865, Cert. Den. 273 U. S. 760;

Isenberg, et al. v. *Trent Trust Co. Ltd.*, 26 F. (2d) 609, affd. 31 F. (2d) 553, Cert. Den. 279 U. S. 862.

The proof in this record of the right, title and interest of AKM on the date of Vesting Order 2097 in the asset here involved is the *ante bellum* final judgment in the state receivership action. Said judgment established the jurisdictional fact, required under subd. 1, §977-b, that AKM has been "dissolved and liquidated" and "ceased to do business" prior to the commencement of that action in June 1941 (R. I. fols. 147, 166-78). In other words, it stands adjudicated that since June 12, 1941, there has been no entity known as AKM capable of owning any property in New York or having any interest therein, legal or equitable, which could be the subject of seizure as enemy property. It is for this reason that subd. 16 of §977-b provides that the balance, if any, remaining after payment of creditors, should be paid (not to AKM, but) to its stockholders *pro rata* or to its foreign receiver or liquidator (R. I. fols. 132-3).

Manifestly, the paramount rights of creditors (*Meyer v. Petrograd Metal Works*, 256 App. Div. 1077, App. Den. 281 N. Y. 887 and Supreme Court cases there cited) accrued as of the date when AKM ceased to exist as an entity, as thus established by final judgment in the state receivership action. It follows, on any view of this record, that more than two years later when the Custodian's limited Vesting Order 2097 became effective, the only right which the Custodian could possibly claim thereunder would be to the balance remaining after expenses and distribution of local claims in the New York receivership proceedings under subd. 16 of §977-b (*United States v. Pink*, 315 U. S. 203, 210, 213; *Guaranty Trust Co. v. Bell*, 46 N. Y. S. (2d) 137).

POINT IV

Every consideration of public policy, law and justice requires the grant of certiorari and the reversal of the judgment below.

"A receivership when long submitted to acquires rights even when in the beginning it was without right. *Harkin* v. *Brundage*, 276 U. S. at pages 52, 58." *Fred T. Ley & Co. v. Wheat*, 64 F. (2d) 257.

"When a receiver has been thus irregularly appointed on such a bill without objection, and the administration has proceeded to such a point that it would be detrimental to all concerned to discharge the receiver, the receivership has been permitted to continue because not seasonably objected to. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497, 500; *In re Metropolitan Ry. Receivership*, 208 U. S. 90, 109, 111; *United States* v. *Butterworth Corporation*, 269 U. S. 504, 513." *Harkin* v. *Brundage*, 276 U. S. 36.

At the time of the commencement of this action by the Custodian on April 22, 1946, the New York receivership was nearly five years old and was about to complete its purpose. Petitioner was first appointed Temporary Receiver by order of June 12, 1941, and then Permanent Receiver by final judgment of September 29, 1941. The action by Petitioner as Temporary Receiver was commenced against ASCAP on July 29, 1941.

Before this action by the Custodian was commenced in April 22, 1946, Petitioner's action against ASCAP had been ordered by the New York Appellate Division for immediate trial in February, 1946. Had plaintiff not interfered with such trial by this action, the chose in action against ASCAP would have been reduced to cash and the rights of all parties finally determined without additional delay or expense.

Indeed, the motivation of the Custodian in instituting this action is difficult to comprehend. No genuine national interest or policy is served thereby. Surely, there has never been any danger of the New York Supreme Court ordering distribution of the receivership assets to enemy aliens in violation of the Custodian's functions. *Leeds* v. *Guaranty Trust Co., supra; Singer* v. *Yokohama Specie Bank, supra; Comm. for Polish Relief, Ltd.* v. *Banco Nationala Rumaniei, supra.* Nevertheless, the Custodian has fallen into a well contrived trap, laid by defendant ASCAP in order to settle the claim for a much smaller sum than is properly due (R. 11, fols. 27-30) by instituting this groundless action to wrest control from the New York court of the long pending litigation instituted by Petitioner therein against ASCAP and awaiting immediate trial.

The Custodian's limited Vesting Order 2097 was not filed until December 7, 1943—two and a half years after Petitioner's appointment as Receiver. No demand was

made by Custodian or his office on Petitioner at any time and nothing further was done by him under Vesting Order 2097 until the institution of this action on April 22, 1946—two and a half years after issuance of his order. During the entire lapse of almost five years, Petitioner was resisting ASCAP's dilatory proceedings in the New York courts which involved eight appeals from intermediate orders.

The only reason given by the Custodian for his failure to make any demand on Petitioner is that in his opinion no demand was necessary (R. I. fol. 302). That, of course, is for the Court to decide. But it necessarily involves a fundamental knowledge by the Custodian of the status, title and interest of Petitioner as Receiver. No such lack of knowledge is asserted or claimed and no reason whatsoever is given by the Custodian as to why nothing was done by him until he filed this action on April 22, 1946.

Such total inaction on the part of a government official vested by law with supreme, paramount and absolutely uncontrolled power and authority at least so far as his freedom of action is concerned, coupled with the obviously limited nature of his vesting order, has great legal significance. It constitutes obvious acquiescence in and recognition of the effectiveness of Petitioner's receivership and the validity of Petitioner's statutory title thereunder. The Custodian should be estopped from asserting otherwise in the instant action so tardily instituted by him.

CONCLUSION

Writ of certiorari should issue.

Respectfully submitted,

A. WALTER SOCOLOW
Attorney for Petitioner.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

BRIEF FOR PETITIONER

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.[1]

1 The record here consists of two records filed in the Court of Appeals. The first record was filed in the appeal found to be premature by the Court of Appeals. The second was the supplemental record filed when the Court of Appeals took cognizance of the judgment as final. References herein to the record are made as follows:

Record on premature appeal: (I R.)
Supplemental record: (II R.)

Jurisdiction

The jurisdiction of this court is founded on Sec. 1254 of Title 28 of the United States Code, this Court having granted a writ of certiorari herein on January 3, 1949, limited to questions 1 and 2 presented by the petition for the writ.

Statement of the Case

The facts are not in dispute.

This action was instituted in the District Court for the Southern District of New York on April 22, 1946 by the Alien Property Custodian to enforce his Vesting Order 2097 (1 R. 112) by which he purported to vest the right, title and interest of certain named European organizations in royalties alleged to be owing under licenses granted by such societies for the performances of musical compositions.

Vesting Order 2097 is here involved insofar as it sought to vest the "right, title, interest and claim" of an Austrian corporation, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (hereinafter called "AKM") in accrued royalties owed to AKM by defendant, American Society of Composers, Authors and Publishers (hereinafter called "ASCAP").

Petitioner is the Receiver of the property and assets of AKM in the State of New York. He was so appointed in an action brought in the Supreme Court of the State of New York under §977-b of the N. Y. Civil Practice Act (1 R. 8, 49-51, 56-60). Petitioner had been litigating against ASCAP in the New York Courts for recovery of said debt for nearly five years prior to the commencement of the instant action by the Custodian.

Petitioner was named as a co-defendant with ASCAP by Count 2 of the complaint which sought a declaratory judgment that, by virtue of Vesting Order 2097, the Custodian had acquired full title to the debt; that Petitioner had no title or interest therein; and that Petitioner's purported acquisition of title to the debt was null and void as against the Custodian. In addition, the complaint sought judgment against ASCAP requiring payment of the debt to the plaintiff as against the Petitioner (I R. 7-11, 15).

As between plaintiff and Petitioner, Propper, the issues were determined on Propper's motion for judgment on the pleadings or for summary judgment and on plaintiff Clark's cross motion for the same relief (I R. 2, 70, 92). As between plaintiff and ASCAP, the issues were disposed of by a stipulation under which ASCAP consented to judgment for Clark in the sum of $46,839.54 (II R. 4-6).

On February 10, 1947, the District Court made a declaratory judgment granting the relief sought by the plaintiff and declaring that Petitioner, as receiver of the property and assets within the State of New York of AKM, acquired no right, title or interest in or to the debt owed to AKM by ASCAP (I R. 152-153). Petitioner appealed from this judgment to the Court of Appeals for the Second Circuit. This appeal was dismissed as not being final because the action had not been disposed of finally as to Petitioner's co-defendant, ASCAP. *Clark* v. *Taylor*, 163 F. 2d 940. Thereafter, on November 21, 1947, the District Court rendered judgment pursuant to the stipulation (II R. 4-6) over Petitioner's objections (II R. 7-11) in favor of the plaintiff against ASCAP for $46,839.54 (II R. 25-26). This was the sum stipulated by ASCAP to be owing to AKM. The judgment having thus been made final, Petitioner appealed both judgments to the Court of Appeals for the

Second Circuit (11 R. 27). On August 3, 1948, the Court of Appeals unanimously affirmed both judgments (11 R. 40).

On June 9, 1941 a creditor of AKM instituted an action in the Supreme Court of New York, New York County, pursuant to §977-b of the New York Civil Practice Act, alleging that AKM had been liquidated and had assets within the State of New York (1 R. 9, 31, 39). The complaint prayed the appointment of a receiver of such assets and the distribution thereof pursuant to §977-b. Summons in this action was served on AKM by publication (1 R. 56).

On June 12, 1941, by order of the Supreme Court of New York, defendant, Propper, was appointed temporary receiver of the New York assets of AKM. The order directed him "to take, receive and reduce to his possession," all the assets of AKM within the State of New York. The order also conferred upon him "all the powers and duties * * * as are possessed by and conferred upon Receivers and Trustees by the laws of the State of New York" (1 R. 50). On September 29, 1941, the Court adjudged Propper permanent receiver of the assets of AKM (1 R. 56-60).

In the interval between these two appointments, on June 14, 1941, Executive Order No. 8389 (5 F. R. 1400) was amended so as to extend the freezing controls to Austria and its nationals (Executive Order No. 8785, 6 F. R. 2897).

On July 9, 1941, Propper, as temporary receiver, served on ASCAP a copy of the order of his appointment accompanied by a demand on ASCAP to pay to him all moneys was to put Propper in possession of the debt owed by due to AKM (1 R. 32, 52-55, 76). The effect of this demand ASCAP to AKM (§977-b, Subd. 20).

On July 29, 1941, defendant, Propper, as temporary receiver, began action against ASCAP in the Supreme Court of New York to recover the debt owed by ASCAP to AKM

(1 R. 78). Extensive pre-trial proceedings were had in this action.[2]

Meanwhile, creditors' claims aggregating more than $90,000 were filed with Propper as receiver (1 R. 77, 78).

Propper's suit had not yet proceeded to trial when, by Vesting Order No. 2097, signed September 4, 1943 (1 R. 112-115), the Alien Property Custodian determined that AKM and its members were nationals of Austria and purported to vest in the Custodian "All right, title, interest and claim of whatsoever kind or nature" of AKM and its members in the license agreement between AKM and ASCAP and of moneys accrued or to accrue thereunder. On September 11, 1943, the Custodian made demand upon ASCAP for payment of the debt due AKM. ASCAP refused the demand (1 R. 10, 67). The Custodian never made any demand on Propper prior to instituting the instant action below.

ASCAP, as defendant in the action brought by Propper against it in the N. Y. Supreme Court, moved to substitute

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2 Propper's right to examine ASCAP before trial affirmed (*sub. nom. Propper* v. *Buck*, 32 N. Y. Supp. 2d 103). ASCAP's motion to dismiss complaint denied. (*Sub. nom. Propper* v. *Buck*, N. Y. Law Journal, October 29, 1941, affirmed 263 App. Div. 948, 34 N. Y. Supp. 2d 134). ASCAP's motion to stay trial denied with leave to renew. (*Sub. nom. Propper* v. *Buck*, 178 Misc. 76, 33 N. Y. Supp. 2d 11). Later ASCAP's motion to stay the trial was renewed and granted on May 16, 1942. This determination was affirmed. (*Sub. nom. Propper* v. *Taylor*, 265 App. Div. 1040). ASCAP's motion for summary judgment denied (*sub. nom. Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. Supp. 2d 829, aff'd. 270 App. Div. 890, 62 N. Y. Supp. 2d 602). Order on ASCAP's motion directing that Custodian voluntarily procure himself to be made a co-plaintiff or be foreclosed of any interest in the subject matter of the action. (*Sub. nom. Propper* v. *Taylor*, 186 Misc. 72, 58 N. Y. Supp. 2d 831, modified by eliminating direction with respect to Custodian in 270 App. Div. 890, 62 N. Y. Supp. 2d 601). The order staying the case was vacated in January, 1946. This determination was affirmed on appeal (*Propper* v. *Taylor*, App. Div., 1st Dept., April 16, 1946 [1 R. 133]).

the Custodian as plaintiff in that action in the stead of Propper. The Custodian appeared specially contesting the service of the motion on him. The Court directed the Custodian to join the action as a co-plaintiff and ordered that, unless he did so within sixty days, he would be foreclosed of any right or interest in the subject matter of the action (*Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. Supp. 2d 829). Both ASCAP and the Custodian appealed the order to the Appellate Division of the New York Supreme Court. This order was modified by eliminating the direction to the Custodian to join as co-plaintiff and, as so modified, was affirmed (270 App. Div. 890, 62 N. Y. Supp. 2d 601). Simultaneously, on April 16, 1946, the Appellate Division unanimously affirmed an order vacating the stay of the action previously secured by ASCAP, restored the case to the trial calendar, and authorized Propper forthwith to proceed with his action against ASCAP (I R. 133).

Six days later, on April 22, 1946, the Custodian commenced the instant suit. In the interval between this date and the making of Vesting Order 2097 on September 4, 1943, the Custodian did nothing to enforce the Vesting Order. On the contrary, he resisted successfully all efforts to bring him into the Supreme Court action brought by Propper against ASCAP. He instituted this action only a few days after Propper, following five years of effort, had succeeded in clearing the way for an immediate trial of his action against ASCAP in the State Court.

Statutes Involved

Section 977-b of the New York Civil Practice Act (Appendix pp. 55-63); Joint Resolution (Public Resolution No. 69, 76th Congress), approved May 7, 1940, amending Section 5(b) of the Trading with the Enemy Act, 54 STAT 179 (Appendix pp. 64-5).

Specification of Errors

1. The Courts below erred in holding that the Custodian, claiming only the interest of AKM, succeeded by his Vesting Order in seizing the ASCAP debt to the exclusion of Petitioner, who, as Temporary Receiver under §977-b of the N. Y. Civil Practice Act, had been vested with the ASCAP debt several years prior to the issuance of the Custodian's Vesting Order.

2. The Courts below erred in failing to find that Petitioner was vested with the ASCAP debt on his appointment as such Temporary Receiver and that AKM had no interest therein which could be seized under Respondent's subsequent Vesting Order.

3. The Courts below erred in holding that Executive Order 8389, issued pursuant to Sec. 5(b) of the Trading with the Enemy Act, prevented Petitioner, as Permanent Receiver, from taking and administering the ASCAP debt in the §977-b receivership proceeding as against the Custodian's subsequent Vesting Order.

4. The Courts below erred in failing to find that the State of New York had power to take and deal with the ASCAP debt in the §977-b proceeding and that the exercise of such power was in harmony with Sec. 5(b) of the Trading with the Enemy Act and Executive Order 8389.

5. The Courts below erred in holding that Executive Order 8389 abrogated the power of the State of New York to take and deal with blocked funds in accordance with §977-b of the N. Y. Civil Practice Act.

6. The Courts below erred in failing to dismiss Respondent's complaint as to Petitioner.

Summary of Argument

I. Custodian's Vesting Order 2097 purported merely to seize the "right, title, interest and claim" of AKM in the ASCAP debt. Therefore, respondent was entitled only to AKM's interest in that debt, if any, on the effective date of the putative seizure. The Vesting Order did not enlarge that interest.

II. Sec. 977-b of the N. Y. Civil Practice Act provides a plan for the administration of all the local assets of defunct foreign corporations. The plan is to marshal and distribute such assets through a receiver appointed in an action instituted against the foreign corporation. Such an action may be begun by personal or constructive service of the summons. If begun by constructive service, a temporary receiver *must* be appointed. Under the statute (subd. 19), the temporary receiver, upon his appointment, is endowed with title to all of the local assets of the defunct foreign corporation. The coincidence of the appointment of the temporary receiver and the simultaneous vesting in him of title to *all* the assets effects a seizure of the *res*. It is only in this way that the court secures jurisdiction to deal with all the assets of the defunct foreign corporation, where the latter cannot be personally summoned, consistently with the due process clause of the 14th Amendment.

Since under §977-b (subd. 19), Petitioner took title to the ASCAP debt before Executive Order 8389 became effective as to Austrian nationals and long before the issuance of the Custodian's Vesting Order, Petitioner—not Respondent—was entitled to recover the debt from ASCAP.

The Courts below mistakenly held that the temporary §977-b receiver is a statutory counterpart of the temporary equity receiver. They concluded that since under the New

York decisions, the latter is not endowed with title, but merely the right to possession, so the temporary §977-b receiver must be without title to the assets of defunct foreign corporations. Such a conclusion was erroneous because there is no analogy in procedure, function or purpose between the totally distinct receivers. The temporary §977-b receiver is the device through whom the court seizes the *res* at the commencement of the action for purposes of *in rem* jurisdiction, while the temporary equity receiver does not require title to perform his function as custodian of property to abide the final judgment. No other seizure device is provided by §977-b as a basis for *in rem* jurisdiction. The statute would violate the due process clause of the 14th Amendment unless the temporary §977-b receiver took title in order to seize the *res* under subd. 19. The appointment of the temporary equity receiver is wholly discretionary. But subd. 4 of 977-b makes the appointment of a temporary receiver *mandatory* at the commencement of an action which is to proceed on constructive service. The temporary §977-b receiver is *sui generis*. No analogy may aptly be made of his powers, purpose or function to those of temporary equity receivers or temporary statutory receivers of domestic corporations. Even the latter receiver takes title to assets of a domestic corporation under New York decisions, and any analogy would require a similar holding in the case of the temporary §977-b receiver.

The rights of the latter—whether called "title" or "right to possession"—were superior to those of AKM through whom Respondent claims. The Custodian's Vesting Order seized only the rights of AKM. The Courts below erroneously gave the Vesting Order a force greater than it purported to have. They permitted Respondent to take the ASCAP debt as against Petitioner. AKM could not have done so.

III. Petitioner, as Permanent Receiver, took title to the ASCAP debt as of the commencement of the 977-b proceeding. The freezing controls of Executive Order 8389 were not then applicable to property of Austrian nationals. Therefore, Executive Order 8389 has no application to this case. Assuming, however, that Petitioner's rights as Permanent Receiver were subject to the freezing controls, these did not prevent him from taking title to the ASCAP debt.

Under the 10th Amendment, the states have exclusive power to deal with local property. §977-b was the exercise of this exclusive power by the State of New York. Sec. 5(b) of the Trading with the Enemy Act, upon which Executive Order 8389 rests, did not authorize the President to abrogate the power of New York to deal with the ASCAP debt in the §977-b proceeding.

In issuing Executive Order 8389, the President exercised the power granted to him by the Congressional Joint Resolution of May 7, 1940, amending Sec. 5(b) of the Trading with the Enemy Act. The Executive Order was issued in time of peace. The §977-b proceeding here involved was a peacetime transaction. The impact of Sec. 5(b) and Executive Order 8389 on the §977-b proceeding is to be determined by their peacetime force. The Courts below erred in giving to Sec. 5(b) and the Executive Order their war-time force retrospectively against the peacetime transaction here involved.

On Sept. 29, 1941, final judgment was entered against AKM appointing Petitioner permanent §977-b receiver. Sec. 5(b) was then a measure designed solely to protect certain property in the United States, owned by nationals of countries invaded by the Axis, against conquest. It authorized the President to set up a system of freezing controls for screening transactions in such property. Congress made it clear that:

1. No transaction in such property was absolutely proscribed;

2. Each such transaction was to be scrutinized;

3. If the transaction were genuine, the President was to "in no way interfere";

4. The property was in no way expropriated;

5. The property was to be available for the satisfaction of the claims of American citizens.

Sec. 977-b was wholly consistent and in harmony with the system of freezing controls established by Sec. 5(*b*).

Under §977-b, the State of New York could seize title to the ASCAP debt for purposes of *in rem* jurisdiction in the proceeding against AKM. However, payment of the ASCAP debt to Petitioner as Receiver was at most suspended, pending the screening process. After payment of the debt to Petitioner, both he and the State Court were bound by the freezing controls in making distribution to claimants. Distribution could be made to American citizens without hindrance—as Congress intended. Distribution to blocked nationals was suspended, pending the screening process—again, precisely as Congress intended. Thus, the purpose of Sec. 5(b) was more fully served under §977-b. Not one dollar of the ASCAP debt was any more likely to fall into Axis conquest through the §977-b receivership than through ASCAP's hands. Since §977-b was in harmony with Sec. 5(b), it was not abrogated, as to blocked funds, by the federal statute.

The Secretary of the Treasury ruled that Executive Order 8389 did not abrogate the power of New York to seize

blocked funds for purposes of local litigation. He held that merely payment of blocked funds to satisfy a judgment obtained in such a proceeding was subject to the screening process. The New York Courts, with the sanction of the United States as *amicus curiae*, have consistently followed this ruling.

POINT I

The Custodian vested only the interest of AKM, if any, in the debt owed by ASCAP.

The Custodian issues two types of vesting order. One—the so-called "*res*" vesting order—is a seizure of designated property. It is an assertion by the Custodian of a right to possession. Such a vesting order determines no rights in the property but merely that the Custodian is entitled to possession. The ultimate right to the property is determined in a later suit against the Custodian under §9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoehr v. Wallace*, 255 U. S. 239, 245-6.

The other type—the "right, title and interest" vesting order—is a seizure of the enemy's interest in designated property. Such a seizure does not determine the *quantum* of that interest. The Custodian merely steps into the enemy's shoes. The seizure can be executed only after the enemy's interest has been determined. *Miller v. Rouse*, 276 F. 715, 716; *Kahn v. Garvan*, 263 F. 909, 912.

Vesting Order 2097, under which Clark here claims, is of the latter variety. By this order, the Custodian did not seize the *res*, i.e. the debt owing from ASCAP to AKM. He seized only the "right, title, interest and claim" of AKM in this debt (I R. 112-116). The complaint so alleges (I R.

10). Plaintiff's affidavit so concedes (I R. 109). The Custodian is limited to that interest. Such interest is neither enlarged nor contracted by the seizure.

> "Upon these assumptions, it is necessary briefly to consider the nature of the 'right, title, and interest' which was the subject of the putative capture. *It did not profess to be greater than the right of the enemies as cestuis que trustent*, and it did not in law change the substance, or the incidents, of the right itself, any more than if, for example, it had been an unliquidated claim for breach of contract. Nor, indeed, could the Alien Property Custodian under such a demand, or unless he asserted a legal right to the securities themselves, by capture change the character of the enemy's right as obligee. If it be a chose in action, subject to an accounting as a condition of its assertion, he must submit to some judicial determination between himself, as captor, and the trustee as obligor. Such a demand neither enlarges nor contracts the rights seized." *Kahn* v. *Garvan*, 263 Fed. 909, 912 (L. Hand, *J.*). (Italics supplied.)

The cases uniformly so hold. *Miller* v. *Rouse*, 276 Fed. 715, 716; *U. S.* v. *The Antoinetta*, 153 F. 2d 138, 143; *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, 613, *aff'd. on rehearing* 31 F. 2d 553, *cert. den.* 279 U. S. 862; *Mayer* v. *Garvan*, 270 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, *cert. den.* 284 U. S. 687; *U. S.* v. *The San Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark* v. *Edmunds*, 73 F. Supp. 390, 392-4; *Chase Nat. Bank* v. *Reinicke*, 76 N. Y. S. 2d 63, 65.

Under Vesting Order 2097, plaintiff, Clark, is thus entitled to whatever interest AKM then had in the ASCAP debt—no more. Petitioner's position is that, as receiver of

the New York assets of AKM, he was vested with the whole of AKM's interest in the ASCAP debt. Therefore, when the Vesting Order was made more than two years later, AKM had no interest in the ASCAP debt. Therefore, the Custodian took nothing by the Vesting Order.

POINT II

The whole of AKM's interest in the ASCAP debt passed to Propper upon his appointment as temporary receiver. Therefore, the Custodian's subsequent vesting order seized nothing.

Acting under §977-b of the New York Civil Practice Act, on June 12, 1941, the New York Supreme Court appointed Propper temporary receiver of the New York assets of AKM, an Austrian national (1 R. 49-50). This appointment antedated June 14, 1941—the day on which the freezing controls of Executive Order 8389 were extended to Austrian nationals (6 F. R. 2897). It antedated September 4, 1943—the day on which Vesting Order 2097 was made (1 R. 10, 112-115).

Therefore, on the date of Propper's appointment as temporary receiver, he acquired—unaffected by any Federal statute or executive order—the interest in AKM's New York assets specified by §977-b of the New York Civil Practice Act. This interest was title to all of AKM's New York assets. Subd. 19 of §977-b so states in the following explicit language:

> "19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within

the state of New York shall immediately vest in the receiver upon the making of the order appointing him. . . . "

Despite the unambiguous language of the statute, the Court of Appeals held that Propper, as temporary receiver, took nothing as against AKM or as against the Custodian who merely succeeded to its rights. The Court of Appeals reasoned as follows:

1. "The New York courts have consistently ruled that a temporary receiver *pendente lite* does not obtain title to the property, but has only a right of possession."

2. Since the New York cases "show such general understanding in New York of the restricted rights of a temporary receiver, we should look for clear statutory language to disclose a different intent for this one situation here."

3. No such intent "is to be found in §977-b of the N. Y. Civil Practice Act." Sec. 977-b does not depart from—but follows—the general New York rule, applied to temporary chancery receivers, that the temporary receiver does not take title but, merely, a right to possession.

We submit that the Court of Appeals wholly misconceived §977-b. This is because

(a) §977-b provides a plan for the liquidation and distribution of "all" of the New York assets of defunct foreign corporations. In this plan, the temporary §977-b receiver serves a function wholly different from that

of a temporary equity receiver: The temporary §977-b receiver is the instrument through whom—as in attachment, garnishment, etc.—the Court seizes the *res* to be administered in the *in rem* proceedings envisioned by §977-b where personal service of the summons cannot be made. The equity receiver is merely a custodian who takes possession of the property in order to preserve it pending the outcome of the action. Through the temporary §977-b receiver, the court seizes the *res* at the commencement of the action for purposes of *in rem* jurisdiction. Through the temporary equity receiver the court, having already acquired jurisdiction, preserves the property pending determination of the action.

(b) To hold that the temporary §977-b receiver does not acquire title is to hold that this statute authorizes *in rem* proceedings without prior seizure of the *res*. So construed, §977-b would violate the due process clause of the 14th Amendment to the U. S. Constitution.

(c) §977-b clearly defines the authority vested in the temporary receiver appointed thereunder. No analogy to the authority vested in any other temporary receiver is apt. If such analogy is to be made, the temporary statutory receiver—not the chancery receiver—should be selected for the comparison. Since the temporary statutory receiver takes title, the same result would follow, by analogy, under §977-b.

1. ***Title to all of AKM's New York assets vested in Propper, as temporary receiver, as a part of the plan of §977-b to achieve in rem jurisdiction.***

Sec. 977-b embodies a plan for the distribution of *all* the assets within the State of New York of defunct foreign corporations. The plan is to marshal and distribute such assets through a statutory receiver appointed in an action commenced against the foreign corporation (§977-b, subd. 1, 2; Appendix p. 55). It is competent for the state so to administer the local assets of defunct foreign corporations. *Clark* v. *Williard*, 294 U. S. 211.

Alternative methods are specified for commencement of the action. One is by personal service of the summons. In such case, no temporary receiver can be had. The other is by constructive service of summons. In the latter instance, a temporary receiver "must" be appointed "without notice". Such method is available only where "personal service cannot be effected within the state with due diligence" (§977-b, subds. 4, 5).

The scheme of the statute is clear. Where personal service of summons can be had, the action is to proceed on such service. Where personal service cannot be had with diligence, constructive service of the summons is authorized. However, under the Federal Constitution (14th Amendment), constructive service is effective to confer jurisdiction only where property has been seized at the outset of the action. A judgment in an action thereby instituted is binding only in respect to the property so seized. *Pennoyer* v. *Neff*, 95 U. S. 714, 726, 728, 733; *Security Savings Bk.* v. *California*, 263 U. S. 282, 287; *Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme* v. *Buckelew*, 229 N. Y. 363, 371; *Mathews* v. *Mathews*, 247 N. Y. 32, 34.

Sec. 977-b meets this constitutional dictate by providing for the mandatory appointment of a temporary receiver through whom the seizure is effected. The coincidence of the appointment of the temporary receiver (§977-b, subd. 4) and the simultaneous vesting in him of title to all the local assets (§977-b, subd. 19) effects a seizure of the *res*, namely all the property of the foreign corporation in New York. In this way, all of the New York assets of the foreign corporation may be proceeded against even where personal service is impossible.

Such a seizure device is necessary because the plan of the statute is to deal with *all* the local assets—those known as well as those undiscovered. The usual seizure devices, fashioned to seize a specific *res*, are not adapted to this plan. Attachment (*Cooper* v. *Reynolds*, 11 Wall. 308), garnishment (*Harris* v. *Balk*, 198 U. S. 215) and injunction (*Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269) are shaped only to the seizure of specific disclosed property and result in a judgment binding only the particular property seized at the outset. By directing the appointment of a temporary §977-b receiver and, simultaneously, vesting him with title to all the assets, *all* of the foreign corporation's local property is seized at the commencement of the §977-b suit and may be dealt with by the judgment therein consistently with the requirements of due process.

Clearly, this is the plan of the statute.

The appointment of the temporary §977-b receiver is inextricably bound up with the constructive service of summons. Only where "personal service cannot be effected within the state of New York with due diligence" is authority given to appoint a temporary receiver (§977-b, subd. 4). Only after a temporary receiver has been appointed is authority given for constructive service of the summons by publication (§977-b, subd. 5).

Further, once the need for constructive service appears, the statute makes the appointment of the temporary receiver mandatory (subd. 4). This mandatory direction is in sharp contrast to the discretion invariably committed to the court in the appointment of the usual temporary equity receiver. The appointment of the temporary §977-b receiver is a "must"—rather than a matter of grace—because upon his appointment, rests the validity of the constructive service.

The provision for appointment of the temporary §977-b receiver "without notice" also emphasizes this conclusion. *Ex parte* action is usual where the purpose of process is seizure for jurisdictional purposes. This is in contrast to the notice required in case of appointment of the usual temporary corporate receiver (N. Y. *General Corporation Law* §162).

Finally, unless *in rem* jurisdiction is acquired by appointing the temporary receiver and vesting him with title to the assets affected, the statute lacks the seizure device required for *in rem* proceedings. There is no provision for attachment, garnishment or other seizure process to effect the *in rem* jurisdiction so clearly contemplated by the statute.

The Court of Appeals failed to perceive the function of the temporary §977-b receiver as a device for perfecting *in rem* jurisdiction. It saw the temporary §977-b receiver only as the statutory counterpart of the usual temporary equity receiver, appointed to preserve property *pendente lite*. Pursuing this analogy, it concluded that, as the latter is without title, so must be the former. This decision was reached notwithstanding the following plain provisions of subd. 19, §977-b:

> "19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every

kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. * * * "

Even if the statute did not so provide expressly, the same result would follow as a matter of construction. Under New York law, a seizure by attachment for purposes of *in rem* jurisdiction impresses a security title upon the seized property. *Fiedmann v. Brunner* (1874), 2 Hun 354, 356; *Embree v. Hanna*, 5 Johns. 101, 103; *Lynch v. Crary*, 52 N. Y. 181, 184; *Logan v. Greenwich Trust Co.* (1911), 144 App. Div. 372, *aff'd.* 203 N. Y. 611; *West Virginia P. & P. Co. v. People's Home Journal, Inc.* (1931), 233 App. Div. 376, 378; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 207; *Elkay Refrigerator Corp. v. Savory Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161. The seizure through the temporary §977-b receiver affords a similar remedy. It should be similarly construed. *Kohlsaat v. Murphy*, 96 U. S. 153, 159; *Lamp Chimney Co. v. Ansonia Brass etc. Co.*, 91 U. S. 656, 662; *Mathews v. Mathews*, 240 N. Y. 28, 34.

It may be that the temporary §977-b receiver will in fact act to conserve the property which he seizes. But this is purely incidental to his primary function, namely, to seize all of the foreign corporation's property for purposes of *in rem* jurisdiction. Had the New York Legislature chosen a more familiar process of seizure, such as attachment, garnishment, etc., analogy to temporary equity receivership would be unthinkable. The analogy is no more apt merely because the New York Legislature chose the instrumentality of a temporary receivership to effect the seizure of "all the assets" envisioned by §977-b.

The construction placed upon §977-b by the Courts below would make it impossible for this statute to operate within constitutional limitations. Sec. 977-b authorizes a judgment, on constructive service, appointing a permanent receiver to liquidate and distribute "all of the assets" of the defunct foreign corporation in New York. Such a judgment would violate the due process clause of the 14th Amendment unless "all of the assets" were seized at the commencement of the action. (See cases cited *supra* at p. 17). Unless §977-b, subd. 19 is construed to effect such a seizure through the temporary receiver, none is provided for by the statute. The statute, therefore, could not operate within the limitations imposed by due process. The Court of Appeals erred in giving §977-b a construction which would render it open to constitutional objections when a lawful construction is possible and, indeed, is dictated by the clear and apt language of the statute. *U. S. ex rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366, 407; *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 390; *Crowell* v. *Benson*, 285 U. S. 22, 62.

The misinterpretation of §977-b by the Court of Appeals brings into sharp focus this Court's admonition to the lower federal courts against construing state statutes before they have been construed by the state courts themselves. *Musser* v. *Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101.

Sec. 977-b vested title to the ASCAP debt in Propper. By his demand, Propper had taken possession of the debt which was then subject to the control of the state court. By its holding, the Court of Appeals struck down the provisions of the statute which gave Propper title and possession of the ASCAP debt. This was in violation of the full faith and credit clause of the Federal Constitution.

Converse v. *Hamilton*, 224 U. S. 243. In ordering ASCAP to pay the debt to respondent, Clark, as the sole and exclusive owner, it wrested this asset from the possession and custody of the state court in violation of the settled rule of this Court. *U. S.* v. *Bank of N. Y. & Trust Co.*, 296 U. S. 463, 477, 478; *Lion Bonding & S. Co.* v. *Kuratz*, 262 U. S. 77, 88; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229.

2. ***Apart from the title vested in the temporary §977-b receiver for purposes of the seizure required to perfect in rem jurisdiction, Propper acquired rights as such temporary receiver which are superior to those of the Custodian who claims only through AKM.***

The lower courts found it necessary to analogize the temporary §977-b receiver with the temporary equity receiver, in order to deny Propper's title. There was no need to seek any analogy. Sec. 977-b was enacted to achieve a specific purpose, unprovided for elsewhere. This special statute makes comprehensive provision for its expressed plan of liquidation and distribution. The part played by the §977-b receiver, temporary or permanent, is defined in clear and unmistakable terms. The lower courts should have construed the statute as written. They erred in limiting the plain words and purpose of this modern statute by the *dicta* of old chancery cases.

The Court of Appeals reasoned that a temporary §977-b receiver is comparable to a temporary equity receiver; that under New York law the temporary equity receiver does not take title but only a right to possession; and that, therefore, Propper took no title as temporary §977-b receiver.

This reasoning is erroneous in two respects, at least. *First*, the temporary §977-b receiver is not comparable to the temporary equity receiver either in purpose or function.

Second, to say that the standing here of the temporary §977-b receiver depends on whether he took "title" is to beg the question to be decided. Whether Propper may hold the ASCAP debt depends upon the rights which he acquired as temporary receiver not whether these rights add up to the conventional notion of "title".

The Temporary §977-b Receiver is not Comparable with the Temporary Equity Receiver

Sec. 977-b is a special legislative plan for marshalling and distributing, among creditors and stockholders, the New York assets of defunct foreign corporations. *Oliner* v. *American-Oriental Banking Corp.*, 252 App. Div. 212, aff'd. 277 N. Y. 588. The function of the temporary §977-b receiver in this plan (*supra*, pp. 17-21) is merely to effect seizure of the assets for purposes of *in rem* jurisdiction and for this purpose he has title (§977-b, subd. 19). Neither the temporary equity receiver nor the temporary statutory receiver (appointed in proceedings against domestic corporations) has a comparable function. Strictly speaking, the temporary §977-b receiver is not to be compared with either of these. He is *sui generis*. Excepting only this case, we have found no instance in which such a comparison has been made.

Even the temporary statutory receiver of a domestic corporation and the temporary equity receiver are contrasting in their functions. The New York Courts have noted, as we shall presently show, that the functions of the temporary equity receiver do not require that he have title. The reverse is true in the case of the temporary statutory receiver.

The power to appoint a temporary equity receiver is an incident to the jurisdiction of the chancery court. This power

does not depend upon statute. It may be exercised irrespective of whether the parties are individuals or corporations. The temporary equity receiver is merely a conservator appointed to care for and preserve property *pendente lite*. He is appointed most commonly in mortgage foreclosure cases. In such cases, he is appointed to impound the rents and profits of the mortgaged property so that they may be applied to the debt when ascertained by the final judgment. The temporary equity receiver represents only the court—not the creditors or other parties. He cannot be appointed to marshal or distribute a corporate debtor's assets. *U. S. Trust Co.* v. *N. Y. W. S. & R. R. Co.*, 101 N. Y. 478, 483, *same case* 42 Hun 341; *Decker* v. *Gardner*, 124 N. Y. 334, 338, 339.

Obviously, in the usual equity case, it is not necessary for the temporary equity receiver to take title to the property in litigation. In the mortgage foreclosure action, he does not need title to the mortgaged property in order to serve his function of collecting the rents and profits. Therefore, the equity courts held that the temporary equity receiver does not acquire title to the subject matter of the litigation. This—and nothing more—is the significance of the *dicta* of the cases cited in the opinion of the Court of Appeals.[3]

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3 The cases cited in the opinion of the Court of Appeals do not, on their facts, support the court's conclusion. *Keeney* v. *Home Ins. Co.* (1877), 71 N. Y. 396 merely held that a temporary equity receiver in an action to dissolve a partnership did not take title to the partnership property so as to void the condition of a fire insurance policy against change of title or possession. *Herring* v. *New York, L. E. & W. R. Co.* (1887), 105 N. Y. 340, 372, 373-375, dealt only with the powers of a temporary equity receiver appointed in a corporate mortgage foreclosure action and of the same receiver appointed as a temporary equity receiver in a parallel equity action—not statutory proceeding—brought by the People to dissolve the corporation. *Decker* v. *Gardner* (1891), 124 N. Y. 334 involved only the question of whether a temporary equity receiver, appointed in an action to foreclose a corporate mortgage, was properly

The temporary statutory receiver of a domestic corporation serves an entirely different purpose. His authority is derived from statute. He is appointed only in proceedings where it is necessary to marshal and distribute corporate assets. He takes the corporate property as the first step in the statutory plan to marshal all the corporate assets in order to secure equality in the payment of claims of creditors by preventing priority and preferences through attachments and judgments.

The distinction between these two temporary receivers was clearly drawn in *New York Title & Mortgage Co. v. Polk Arms Inc.* (1933), 262 N. Y. 21, in which the court, contrasting the temporary equity receiver and the statutory receiver, said at pp. 28, 30:

"* * * Receivers of the property of a corporation are appointed pursuant to statute in actions for sequestration, in actions to annul a corporation and in other actions where violation of the law or insolvency is

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substituted for the corporation in an action of trespass brought before his appointment. *Stokes v. Hoffman House* (1901), 167 N. Y. 554 involved merely the question of the liability for rent of a temporary equity receiver appointed in an action to foreclose a mortgage covering leases and chattels. The Court (p. 560) was careful to point out the distinction between equity and statutory receivers. *Sigua Iron Co. v. Brown* (1902), 171 N. Y. 488 involved the question of whether a New York receiver appointed in proceedings ancillary to a Pennsylvania temporary equity receivership could be substituted as plaintiff in a New York action by the foreign corporation to recover unpaid calls on stock. *Mutual Brewing Co. v. New York & C. P. Ferry Co.* (1907), 123 App. Div. 149, 45 N. Y. Supp. 101 involved the right of the purchaser of a cause of action to be substituted as plaintiff in a negligence case, the cause of action having been sold *pendente lite* by the permanent receiver of the plaintiff corporation, appointed in an action to dissolve the corporation. *In re French* (1918), 181 App. Div. 719, 168 N. Y. Supp. 988, aff'd. 224 N. Y. 535, involved a proceeding to dissolve a corporation in which a permanent receiver had been appointed. The court held that it had power in this action to enjoin a proceeding to foreclose a corporate mortgage.

shown and judicial supervision of the corporation is required. Such receivers take title to all the corporate property for the benefit of all the creditors and stockholders. The appointment of a receiver of rents and profits is a not unusual incident of an action on mortgage foreclosure. The inconsistency of language may be due to a confusion of ideas. Section 150 of the General Corporation Law has to do in general with the appointment of a receiver of the general assets of an insolvent corporation named to secure equality of payment of claims due creditors by preventing priority through attachments and judgments. Such purpose is not germane to the appointment of a receiver of the rents and profits of the mortgaged property which are assigned by a mortgagor to the holder of the mortgage as additional security for the payment of the mortgage indebtedness.

"We have one kind of receiver of the property of the corporation appointed in insolvency and another kind in mortgage foreclosures who is a mere receiver of rents and profits, appointed by the court by or without the consent of parties. The former is appointed only as the Court has been given jurisdiction over corporate bodies (*U. S. Trust Co. v. New York, W. S. & B. Ry. Co., supra*). The latter is appointed without authority from statute."

This contrast in the function of, and the necessity for, the two receivers accounts for the vast differences in their rights and power. The temporary statutory receiver—in contradistinction to the equity receiver—is endowed with title to the corporate property to the extent that his trust

requires. In *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, the Court speaking of the powers of the temporary statutory receiver (appointed to sequester the assets of an insolvent corporation) granted by former §1788 of the New York Code of Civil Procedure (now §162 of the New York *General Corporation Law*) said:

"* * * In the case at bar the defendant corporation had secured a fraudulent preference, and the amount thus realized by it was in law the property of the New York Supply Company, and it was the duty of its temporary receiver, who was vested with all its property to sue, recover the money, if possible, and to hold it subject to the further order of the court. *It is the evident policy of the statute to vest in the temporary receiver many of the important powers that are exercised by a permanent receiver, and this for the very obvious reason that before final judgment, in an action to procure the dissolution of a corporation, it is of vital importance that the title of the corporate property should be vested in an officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceeding necessary in the premises.*

"In such an action it would be not only an empty form to make the insolvent corporation a defendant, but would be inconsistent with the appointment of *the temporary receiver, who for the purposes of holding, protecting and reducing to possession the property and assets of the Company, is vested with title and represents the corporation and its creditors as fully as a permanent receiver after final judgment of dissolution.*" (Italics supplied.)

It was because the temporary statutory receiver took the property—not as a mere custodian as in the case of the equity receiver, but—for the purposes of the statutory scheme of distribution that title vested in him to enable him to fulfill his trust. *Johnson* v. *Rayner* (1898), 25 App. Div. 598, 600, 49 N. Y. Supp. 959, 960; *Frank* v. *Lutton* (1944), 267 App. Div. 703; *National Park Bank* v. *Clark* (1904), 92 App. Div. 262; *Prince* v. *Schlesinger* (1906), 116 App. Div. 500; 1 *Clark, Receivers*, 2nd Ed. §345; *Converse* v. *Hamilton* (1914), 224 U. S. 243, 255; *Bernheimer* v. *Converse*, 206 U. S. 516, 534.

In view of the clear contrast in their functions, there is no basis for analogy of any one of the three types of temporary receiver with either of the others. If there is any point of similarity among the three, the temporary §977-b receiver is like the statutory receiver for a domestic corporation in that both are appointed in actions designed to marshal and distribute corporate assets. If this point of similarity justifies an analogy, it is to the temporary statutory receiver only. Such an analogy, under the cases cited *supra*, would require the holding that title vests in the temporary §977-b receiver as it does in the case of the temporary statutory receiver. In this regard both are in contrast to the temporary equity receiver.

The fact is that resort must be had to the equity practice to ascertain the powers of the temporary equity receiver. Resort must be had to the respective statutes involved to ascertain the powers of the temporary §977-b receiver or the temporary statutory receiver of a domestic corporation. *New York Title & Mortgage Co.* v. *Polk Arms, Inc.* (1933), 262 N. Y. 21.

Adverting to §977-b for Propper's rights and power and authority as temporary receiver thereunder, it is clear that he had title. Subd. 19 of §977-b so states in so many words.

Subd. 12 reinforces this conclusion in providing that "any receiver appointed pursuant to this section" is vested with "all the powers and duties * * * conferred upon receivers and trustees by the laws of the State of New York." Such powers include title to the corporate assets. *N. Y. General Corporation Law* §§168, 169.

Under the law of New York the Court has the option of conferring upon the temporary statutory receiver of a domestic corporation all the power and standing of a permanent receiver, excepting only the power to distribute (*N. Y. General Corporation Law*, §162). Under §977-b the matter is not optional. Subd. 12 of §977-b directs that the temporary §977-b receiver shall have the powers of a permanent receiver. Thus, the Legislature has merely made mandatory, in case of the temporary §977-b receiver, that which it left to the choice of the court in the case of the temporary statutory receivers for domestic corporations. The state court, in appointing Propper, so construed and applied subd. 12 of §977-b (I R. 59).

The Court of Appeals found otherwise. It held that subd. 12, despite its broad language, is to be restricted to mean that the temporary §977-b receiver takes only the powers and duties of other temporary receivers (presumably in equity) conferred by the laws of New York. This construction rests wholly on the premise, assumed by the court, that the temporary §977-b receiver is analogous to the temporary equity receiver. Since this premise is faulty, as we have shown, there is no basis for the conclusion.

Had the Court of Appeals searched the statute—instead of the old equity cases—for aid as to the meaning of subd. 12, it would have found convincing proof that the broad powers granted by subd. 12 were meant to apply to the temporary, as well as the permanent, receiver.

The grant in subd. 12 runs in favor of "any receiver appointed pursuant to" §977-b. Language so clear and unequivocal requires no construction. It was not open to the Court of Appeals, in the guise of construing this unambiguous statute, to enact a qualification of the statute not made by the New York Legislature. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343; *Osaka Shoshen Kaisha Line* v. *U. S.*, 300 U. S. 98, 101. "Any receiver" means either a temporary or a permanent receiver under §977-b. This is the meaning which inheres in this phrase in its usage elsewhere in the statute. Thus, in subd. 19, "Any receiver appointed pursuant to the provisions of this section" may be substituted for the corporation, may intervene in, and may revive any, action. Subd. 20 specifies the circumstances under which possession of the corporation's assets is deemed to have vested in "Any receiver appointed pursuant to this section." Conduct of suits and acquiring possession of the sequestered assets pertain alike to the functions of both the temporary and the permanent receiver. No reason is given by the Court of Appeals why the words "Any receiver etc." used in subd. 12 must be construed differently than in subds. 19 and 20. Therefore, these words must be given the same meaning in all three sections. *Pampagna Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218.

Sec. 977-b specifies a procedure for marshalling and distributing the New York assets of foreign corporations. It has no counterpart in any other statute or in traditional equity practice. Its provisions are clear and well adapted to its purposes. There is no warrant for reading ambiguity or doubt into the statute by way of analogy to other temporary receiverships which are wholly different both in procedure and purpose.

Propper's Rights as Temporary Receiver—Irrespective of Whether Labeled "Title" or "Right to Possession"—Are Superior to Those of the Custodian Who Claims Only Through AKM.

In the view of the Court of Appeals, this case turned on whether Propper, as temporary receiver, took conventional "title". It held that he did not. We have, we think, demonstrated otherwise.

Assuming that Propper did not take title, the Courts below, in searching for conventional "title", begged the question to be decided. "Title" is a label—a synonym for certain rights. The genuine inquiry here is not whether the temporary receiver took "title". It is, rather, whether his rights, however labelled, were superior to those of the Custodian who took merely AKM's right, title and interest. If Propper's rights were superior, the judgment must be reversed, irrespective of whether those rights, in the aggregate, may be labelled "title" or "right to possession". So viewed, the Custodian's rights are clearly subordinate to those vested in Propper as temporary receiver.

Upon Propper's appointment as temporary receiver, and particularly after his demand on ASCAP, the ASCAP debt was in the custody of the state court for the purposes of Propper's trust under §977-b. *Palmer* v. *Texas*, 212 U. S. 118, 129; *Farmers Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51. The interest thus vested in Propper was superior to the lien of attaching and replevining creditors. *Matter of Christian Jensen Co.* (1891), 128 N. Y. 550, 553. Also, it was superior to the rights of a bankruptcy trustee. *In re Denton & Haskins Music Pub. Co.* (1935), 10 F. Supp. 802. So, too, as against execution creditors. *In re Lenox Corp.*, 57 App. Div. 515, affd. 167 N. Y. 623; *Wiswall* v.

Simpson, 14 How. (U. S.) 52, 68. *A fortiori*, Propper's rights to the ASCAP debt were superior to those of AKM.

It matters not how these rights are labelled. Their legal effect is the same whether they add up to conventional "title" or the "right to possession." In a liquidation proceeding such as this the right to possession without more confers an equitable title on the temporary §977-b receiver. Any title remaining in AKM would be purely formal and held in trust for Propper. *Lafayette Trust Co.* v. *Biggs*, 213 N. Y. 280, 287; *Matter of Atty. Gen.* v. *Atlantic Mutual Life Ins. Co.*, 100 N. Y. 279, 282, 1 *Clark, Receivers*, 2nd Ed., §344.

The Custodian claimed only the right of AKM. As against Propper, the temporary receiver, AKM had no right to its New York assets. *A fortiori*, the Custodian had none.

The vice of the holdings below is that they do not limit the Custodian's right to AKM's interest. They give the Custodian a standing superior to that of AKM or of an attaching creditor and, indeed, superior to that of the Supreme Court of New York itself, in whose custody the ASCAP debt was lodged for the benefit of AKM's creditors and stockholders. The judgments below did not enforce the Custodian's seizure. They created rights in the Custodian which he neither purported to, nor actually did, vest. The Courts below unwittingly enlarged the Vesting Order in the belief that they were merely executing it. This was error.

POINT III

The Freezing Controls Did Not Preclude Propper, As Permanent Receiver, From Taking The ASCAP Debt.

As permanent receiver, Propper succeeded to the property vested in himself as temporary receiver. In the latter capacity, he had taken the ASCAP debt before the freezing controls became effective as to Austrian nationals. Therefore, both as temporary and as permanent receiver he held the ASCAP debt free of these controls. Exec. Order 8389 is wholly inapplicable to this case.

The Courts below found it necessary to apply Exec. Order 8389 to this case because they mistakenly assumed that §977-b vested title in Propper only upon his appointment as permanent receiver. They held that, since this appointment came after the effective date of the Exec. Order, it was ineffective to vest Propper with title to the ASCAP debt. This holding was erroneous even if we assume as valid the mistaken notion that title to the ASCAP debt could not have vested in Propper until he was appointed permanent receiver. The difficulty with the holdings below is that they overlooked two salient points.

First, Propper's rights as permanent receiver related back to the commencement of the §977-b proceeding. Exec. Order 8389 was not then effective as against the property of Austrian nationals. *Second*, Sec. 5(b) of the Trading with the Enemy Act, on which Exec. Order 8389 rests, was not intended to, and, in fact, did not forbid the seizure of the ASCAP debt for the purposes of the §977-b proceeding.

A

Propper, As Permanent Receiver, Took Title to the ASCAP Debt as of the Commencement of the §977-b Proceeding. Therefore, His Rights as Permanent Receiver Were Unaffected By Executive Order 8389.

The extension of Exec. Order 8389 to Austrian nationals was effective on June 14, 1941 (6 F. R. 2897). It did not purport to affect property interests vested prior to this date. The ASCAP debt had been seized by the State Court, previously, on June 12, 1941 when the §977-b proceeding began.

The proceeding was one to marshal and distribute AKM's New York assets among its creditors and stockholders. As such, it was a proceeding *in rem* against all of AKM's New York assets. *Meyer* v. *Petrograd Metal Works*, 256 App. Div. 1077, *app. den.* 281 N. Y. 887; *Oliner* v. *American-Oriental Banking Corp.* 252 App. Div. 212, *aff'd.* 277 N. Y. 588.

In such cases, the rights of the interested parties in the *res* are fixed as of the commencement of the action. The assets to be dealt with are then constructively seized and in the custody of the court impressed with the rights of creditors. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Everett* v. *Judson*, 228 U. S. 474, 478; *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S. 642, 649; *Palmer* v. *Texas*, 212 U. S. 118, 119; *Farmer's Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51; *Higgins* v. *Worthington*, 90 Hun 436, 35 N. Y. Supp. 815; *In re Berry*, 26 Barb. (N. Y.) 55; *Hall* v. *Holland House Co.*, 12 N. Y. Misc. 55, 57; *In re Denton & Haskins Music Pub. Co.* (S. D. N. Y. 1935), 10 F. Supp. 802.

The act of appointing the permanent receiver does not create the creditors' rights against the *res*. It merely supplies the means by which the trust—already impressed upon the property by commencement of the action—is executed. In this scheme, the permanent §977-b receiver is merely the arm of the Court. *White* v. *Ewing*, 159 U. S. 36, 39-40; *Porter* v. *Sabin*, 149 U. S. 473, 479.

Since Propper was appointed permanent receiver to carry out a trust which had already been impressed upon the seized property when Exec. Order 8389 became effective, his power to discharge that trust was unaffected by the Exec. Order. Propper, as permanent receiver, merely administered property theretofore vested in him as temporary receiver at the commencement of the action.[4]

B

Sec. 5 (b) of the Trading with the Enemy Act Did Not Authorize the President to Abrogate the Power of the State of New York to Deal With the ASCAP Debt Through the §977-b Proceeding.

All powers not delegated to the United States are, under the Federal Constitution, reserved to the states, or to the people. (U. S. Const., 10th Amend.; *U. S.* v. *Butler*, 297 U. S. 1, 63.) This Court has often held that the power to deal with local property and its disposition is reserved exclusively to the states. *Hervey* v. *Rhode Island Locomo-*

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4 While Propper, as permanent receiver, took title to the ASCAP debt free of the freezing controls, he could not make distribution to any blocked national until the requirements of Executive Order 8389 had been satisfied as to any such claimant. The Alien Property Custodian could vest the rights on distribution of any blocked national who was also an enemy national.

tive Works, 93 U. S. 664, 671; *Yonley* v. *Lavender*, 21 Wall. 276; *Hoyt* v. *Sprague*, 103 U. S. 613, 630; *James* v. *Draco Contracting Co.*, 302 U. S. 134, 141; *Security Trust Co.* v. *Dodd*, 173 U. S. 624, 628.

Specifically, this Court has held that the states have exclusive power to deal with the local assets of defunct foreign corporations. *Clark* v. *Williard*, 294 U. S. 211, 213. Sec. 977-b was the exercise of this exclusive power by the State of New York.

The Courts below have here permitted the Executive to abrogate this power reserved to the State of New York by the Tenth Amendment to the Federal Constitution. This result follows from the holdings below that Exec. Order 8389 must be construed to have prevented the acquisition, without license, of any interest in the ASCAP debt—whether by "judicial process" or otherwise. These holdings mean, in essence, that, after June 14, 1941, the State of New York was powerless, through the §977-b proceeding, to deal with any of AKM's New York assets unless licensed by the President.

There is grave doubt that, within Constitutional limits, Congress could, by its enactment of Sec. 5(b) of the Trading with the Enemy Act (upon which Exec. Order 8389 rests), abrogate the power of the State of New York, through §977-b, to deal with AKM's New York assets. From the time of institution of the §977-b proceeding (June 9, 1941, I R. 9, 31) until after Propper's appointment as permanent receiver (Sept. 29, 1941 I R. 56-60) this Country was at peace. Therefore, Sec. 5(b) could not be rested on the war power, invoked in 1917 when this section was originally enacted. It is clear that the reenactment of Sec. 5(b) because of the claimed national emergency, due to the invasion of Norway and Denmark, did not confer upon Congress a Constitutional power which it did not have otherwise. *Schechter* v. *U. S.*, 295 U. S. 495, 528.

However, we believe that it is not necessary to probe the Constitutional authority of Congress to enact Sec. 5(b). We believe it is clear that, in conferring authority upon the President under Sec. 5(b), Congress did not empower the President to deprive the State of New York of all power to deal with the ASCAP debt in the §977-b proceeding.

The Courts below, in holding otherwise, have rested their conclusion, exclusively, on the Treasury's General Ruling No. 12, issued under Exec. Order 8389, as construed by Public Circular No. 31, issued by the same agency. General Ruling No. 12 was issued on April 21, 1942 (7 F. R. 2991), seven months after Propper's appointment as permanent receiver and almost one year after the §977-b proceeding had been begun. Pub. Circular No. 31 was issued on August 2, 1946, more than five years after the institution of the §977-b action (11 F. R. 8351).

Exec. Order 8389, in its application to the §977-b proceeding on September 29, 1941, was a peacetime measure intended to protect the property here of the invaded countries (*infra*, pp. 44-5). On the other hand, General Ruling No. 12 and Pub. Circular No. 31 were issued long after we were at war and at a time when enemy property had become subject to the controls of the Trading with the Enemy Act and other war time legislation. These later announcements could not be employed to determine the force which inhered in Sec. 5(b) and Exec. Order 8389 on Sept. 29, 1941.

The Courts below overlooked this vital point of distinction. They gave retrospective force to General Ruling No. 12. In so doing, they thrust the full impact of the subsequent wartime legislation against the property dealt with by §977-b in time of peace. The Courts below erred in giving to Sec. 5(b), Exec. Order 8389 and Gen. Ruling 12, retrospectively, their wartime force against a peacetime trans-

action. *Miller* v. *U. S.*, 294 U. S. 435, 439. This is true here, particularly, since violations of Sec. 5(b) or executive orders or rulings thereunder carry heavy criminal penalties. Exec. Order 8389, §8; *Addy Co.* v. *U. S.*, 264 U. S. 239, 244-5.

The problem here is to determine whether Congress, by Sec. 5(b) enacted in time of peace, empowered the President to abrogate the reserved power of the State of New York to deal with the ASCAP debt, in any way, in the §977-b proceeding.

The extension of the federal controls of Sec. 5(b) into the domain reserved to the State of New York by the Federal Constitution is, at best, a delicate exercise of legislative policy. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 154, 155; *Yonkers* v. *U. S.*, 320 U. S. 685, 690; *Palmer* v. *Massachusetts*, 308 U. S. 79, 84. §977-b "enacted in execution of a reserved power of the state is not to be regarded as inconsistent with" Sec. 5(b), "unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 623. The "purpose to displace the local law must be definitely expressed." *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.

Congress did not empower the President to strike down §977-b nor did he attempt to do so. On the contrary, the plan of §977-b dovetailed neatly into the scheme of federal controls envisioned by Sec. 5(b). This is manifest from the history of Sec. 5(b), the Congressional intention underlying it and the manner in which it has been construed and applied administratively and by the New York courts.

1. The History of Sec. 5(b).

Sec. 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act (40 STAT. 411; Sec. 5b). It was a catch all—enabling control of transactions not otherwise controlled by the Trading with the Enemy Act. The end of the first World War terminated the effectiveness of Sec. 5(b) as well as the other controls of the Trading with the Enemy Act.[5]

Sec. 5(b) was revived on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President during time of war or "during any other period of national emergency declared by the President" (48 STAT. 1). This amendment was directed to the domestic crisis solely. In respect to credits, the 1933 amendment authorized the President to regulate "transfers of credit between or payments by banking institutions as defined by the President." The obvious purpose was to enable the President to suspend payments by the banks to avoid the then current runs on the banks and, thus, to halt the alarming number of bank failures.[6]

The authority given by Sec. 5(b) was invoked next on April 10, 1940 when Germany invaded Denmark and Norway. By Exec. Order 8389 (issued April 10, 1940, 5 F. R.

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5 Sec. 5(b) had been amended twice during the first World War. First, it was amended to extend the President's power to regulation of the export of silver (40 STAT. 535; April 23, 1918). Later, it was amended again to extend the regulatory power to the hoarding of gold and transactions in Government bonds (40 STAT. 966, September 24, 1918).

6 The President made peacetime domestic use of these powers, during the depression, on two occasions—in the Banking Holiday (31 Code Fed. Regs. [1939] §120.1) and in support of the Government's gold policy (31 Code Fed. Regs. [1939] §§50.1 to 50.11).

1400, as an amendment to Exec. Order 6560, dated January 15, 1934) the President froze property in the United States in which "Norway or Denmark or any national thereof has at any time on or since April 8, 1940 had any interest."

Immediately, the question arose as to whether the freezing controls applied to immobilize stocks and other securities. Prior to March 9, 1933, Sec. 5(b) had included stocks and securities within the regulatory power given to the President (40 STAT. 966). The amendment of March 9, 1933, permitting exercise of the regulatory power in peacetime national emergencies, had removed from Sec. 5(b) all reference to "evidence of indebtedness or of the ownership of property."

The Secretary of the Treasury had taken the position that, despite the omission, Exec. Order 8389 applied to stocks and other securities (Gen. Ruling No. 2; 5 F. R. 1474). But the authority of the President to regulate transfers of stocks and bonds was questioned because of the omission.[7] To restore the omission so that Sec. 5(b) would apply to stocks and other securities, and to confirm its use to freeze property in the United States belonging to Norwegian and Danish nationals, Senator Wagner introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 STAT. 179; Appendix, pp. 64-5). Exec. Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, this Executive Order dealt with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Austria, among others (6 F. R. 2897).

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7 H.R. No. 2009, 76th Cong. 3rd Sess. 1940; S.R. No. 1946, 76th Cong. 3rd Sess. 1940; Sen. Wagner in 86 Cong. Rec., pg. 5006.

2. The Joint Resolution Did Not Empower the President to Suspend the Operation of §977-b of the N. Y. Civil Practice Act.

The extent of the impact of Exec. Order 8389 on the §977-b proceeding against AKM depends upon the scope of the authority granted to the President by the Joint Resolution of May 7, 1940 (54 STAT. 179) and the extent to which he exercised that authority. In no event could Exec. Order 8389 have force beyond the power granted to the President by the Joint Resolution. *Miller* v. *U. S.*, 294 U. S. 435, 440; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 610.

The President did not attempt to exceed the power vested in him by the Joint Resolution. In fact, in Sec. 1 of Exec. Order 8389 (issued April 10, 1940, 5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897) he paraphrased the Joint Resolution as follows:

> "SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exporations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."

Nothing in this Exec. Order or in the Joint Resolution suggested that the states were to be deprived of all power to deal with local assets in which affected foreign nationals had an interest. In fact, nothing in either suggested that dealings in New York with a credit such as the ASCAP debt was comprehended by the Exec. Order. The seizure

of the ASCAP debt in the §977-b proceeding was not a transfer "of credit between any banking institutions" under Sec. 1A of the Exec. Order. Plainly, it was not a transaction "in foreign exchange" nor did it involve "The export or withdrawal * * * or the earmarking of bullion or currency" (Exec. Order 8389, Secs. 1, C and D). Further, the reference in Sec. 1E of the Exec. Order to "evidences of indebtedness or evidences of ownership of property," related solely to stocks and other securities (*supra*, p. 40).

It would seem clear, too, that, in dealing with the ASCAP debt, the §977-b proceeding did not involve "payments by or to any banking institution" within the meaning of Sec. 1B of the Exec. Order. However, the President in Sec. 5F of the Exec. Order defined "banking institution" to include persons engaged in the business of banking or foreign exchange "or any person holding credits for others as a direct or incidental part of his business." The definition obviously was intended to apply to persons dealing in credits. ASCAP could hardly be said to be engaged in such a business. However, respondent successfully argued below that ASCAP was a "banking institution" within this definition and that, therefore, payment of the ASCAP debt was subject to regulation under Sec. 1B of the Exec. Order relating to "payments by * * * any banking institution."

Assuming the correctness of respondent's construction of Sec. 1B, the issue is narrowed to this: Did Sec. 1B of the Exec. Order, relating to "payments by * * * any banking institution" destroy the power of the State of New York to deal with the ASCAP debt, in any way, in the §977-b proceeding? The answer must be in the negative.

Sec. 1B of the Exec. Order is taken almost *verbatim* from the Joint Resolution. The former was effective only to the extent of the power granted by the latter. *Miller* v. *U. S.*, 294 U. S. 435, 440; *Campbell* v. *Galena Chem. Co.*, 281 U. S.

599, 610. The Joint Resolution did not define the extent or limits of this power or the effect upon bank credits of exercise of the power by the President. The legislative materials, however, make it clear that, in granting power to regulate payments by banking institutions, Congress did not empower the President to prohibit legitimate dealings with credits.[8]

The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out the Resolution. In his own words,

> "* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals." (86 CONG. REC. 5006.)

The other sponsors of the Joint Resolution were in agreement as to its purpose. Senator Glass said,

> "* * * The plain intent of the joint resolution, as the Senator knows perfectly well, is to prevent Germany from appropriating the property now in the United States belonging to the two nations she is now overwhelming. No other suggestion was made at all." (86 CONG. REC. 5175-5176.)

Senator Connally added,

> "And is not this measure for the purpose of preventing change of title of the property here in the

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8 To ascertain the Congressional purpose we may seek "enlightenment from reports of the Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure." *Wright* v. *Mountain Trust Bank*, 300 U. S. 440, 463, and note 8; *Richbourg Motor Co.* v. *U. S.*, 281 U. S. 528, 536.

United States by conquest, or by any other forcible or violent means?" (86 CONG. REC. 5007.)

It was clear, too, that the Joint Resolution did not prohibit legitimate transactions. Senator Wagner emphasized this as follows:

"Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws." (86 CONG. REC. 5007.) [Italics supplied.]

* * * * *

"Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*"

"Mr. Barkley. That is right." (86 CONG. REC. 5175-5176.) [Italics supplied.]

The Joint Resolution was not intended to interfere with the rights of American citizens to enforce their claims against the property subject to regulation. Thus, Senator Barkley said:

"Mr. Barkley. It should also be stated—and I am sure the Senator omitted it by oversight—that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out of these transactions, and therefore we preserve the property not only for its owners but for the benefit of Americans who may have claims.

"Mr. Wagner. Yes; we are also protecting the banks which may be called upon to make transfers of securities." (86 Cong. Rec. 5006.)

It is evident that the Joint Resolution was enacted to enable the President to ascertain whether a given transaction was the result of "conquest" or "any other forcible or violent means." It "does not absolutely prohibit any transaction." Any Executive Orders issued were to enable "each transaction [to] be scrutinized to determine whether it was bona fide or accomplished through duress." If the transfer were genuine, our Government was to "in no way interfere." In addition, the blocked property was to be available for "the benefit of Americans who may have claims."

The expressed Congressional purpose was purely and simply to protect nationals of Norway and Denmark—and, later, other invaded countries—from being forced to give up, at the point of German guns, property situated in the United States. To this end, the President was given power to screen transactions involving such property. Genuine transactions and the claims of Americans against such property were to be unaffected.

This Congressional intention is the law. It matters not that it is not spelled out in the Joint Resolution in so many words. It would be so even if the statute, read literally, suggested a contrary purpose. In court, the Congressional intent alone has the force of law. *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391; *Johnson* v. *U. S.* (C. C. A. 1st, 1908), 163 Fed. 30, 32; *U. S.* v. *Dickerson*, 310 U. S. 554, 562; *U. S.* v. *American Trucking Association*, 310 U. S. 534, 543-544.

From the Congressional intent underlying the Joint Resolution, it is clear that Congress did not abrogate the power of the states to deal with property within their borders. The Joint Resolution did not expropriate blocked accounts to the United States or to anyone else. It did not in any way proscribe the change of title to blocked funds so long as the ultimate act necessary to consummate the transaction, namely, payment, was suspended until a license had been secured.

New York's seizure of title to the ASCAP debt in the §977-b proceeding was wholly consistent with the language and purpose of the Joint Resolution. The seizure gave jurisdiction to the N. Y. Supreme Court to continue with the proceeding. But payment of the debt became subject to the screening process envisioned by the Joint Resolution. Thus, the §977-b proceeding could go forward without impinging, in any respect, the purpose of the Joint Resolution.

On the contrary, through the §977-b proceeding the purpose of the Joint Resolution would be better served. Through its receiver, Propper, the State Court would sift the claims filed. Those filed by, or on behalf of, blocked nationals could not be paid until screened under Exec. Order 8389. In this regard, Propper, as receiver, would have the same duty as ASCAP to respect the Federal

freezing controls. However, the claims of American citizens could be honored, precisely as Congress intended. In this way, §977-b complemented the Federal controls. It supplied—what the Federal controls then lacked—machinery which would enable American citizens to satisfy their legitimate claims out of blocked property while, simultaneously, claims of blocked nationals were suspended until screened under Exec. Order 8389.

Not one dollar of the ASCAP debt was any the more likely to reach the Axis governments through the §977-b receivership than through ASCAP itself. On the contrary, this result was less likely in the §977-b receivership since the state court was charged with the duty, equally with the Courts of the United States, of enforcing the objective of the Joint Resolution. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

In striking down §977-b, the courts below have done more than merely carrying out the purpose of the Joint Resolution to place the property of blocked nationals beyond the German invader. They have gone far beyond this purpose by placing such property beyond the reach of the legitimate claims of American citizens. To this extent, the judgment below has defeated the expressed purpose of Congress to protect such legitimate claims.

Plainly, §977-b is wholly in harmony with the Joint Resolution. The courts below should not have abrogated its application to the ASCAP debt. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.

3. As Construed by the Federal Executive and the New York Courts, The Joint Resolution Permitted §97.3b to Vest Title to the ASCAP Debt in Propper as Permanent Receiver.

The effect of Exec. Order 8389 upon the power of the State of New York to deal with blocked funds was determined by the Court of Appeals of New York in *Polish Relief Comm.* v. *Banca Nationala A. Rumaniei,* 288 N. Y. 332. There, the plaintiff, acting under the Attachment statutes of the State of New York (N. Y. *Civil Practice Act,* §§902-973), sued the defendant by attaching its bank account in New York City. There, as in the instant case, the proceeding was wholly *in rem*. In the *Polish Relief* case, the Treasury Department had denied a license for which the plaintiff had applied after the commencement of the attachment action. The defendant contended that the freezing controls precluded unlicensed seizure by attachment. The United States, appearing as *amicus curiae* urged that the attachment was valid. The N. Y. Court of Appeals sustained the attachment, saying at p. 338:

> "The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff [citations]. The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question."

The N. Y. Court of Appeals reached this conclusion on the basis of the Treasury's interpretation of Executive Order 8389, saying at p. 338:

> "The dissenting opinion calls upon us to say a word more. As amicus curiae, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. See United States v. Pink, 315 U. S. 203."

The United States made it clear in the *Polish Relief* case that the freezing controls did not abrogate the power of the state to deal with blocked accounts but that payment out of the blocked account to satisfy a judgment was subject to the screening process. Thus, the brief of the United States in the *Polish Relief* case states as follows at p. 39:

> "From the very inception of freezing control, litigants, prior to commencing attachment actions against funds belonging to blocked nationals, have requested the Secretary of the Treasury to license a transfer to the sheriff by attachment. In all those cases, running into the hundreds, the Treasury Department has taken a consistent position. The Treasury Department has authorized the bringing of an attachment action. However, the Treasury Department has not licensed a transfer of the blocked funds to the sheriff prior to judgment.
>
> "In response to requests that a license be issued to transfer the attached funds prior to judgment, the Treasury Department has, in practice, made a statement of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.
>
> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action. * * *"[9]

In so ruling, the Secretary of the Treasury was acting under the authority granted in Sec. 1 of Exec. Order 8389 to authorize transactions "by means of regulations, rulings, instructions, licenses or otherwise".

The Courts of the State of New York have consistently followed this ruling and interpretation of the Joint Resolution and the Exec. Order. They have held, in many cases, that they have power to entertain litigation respecting blocked accounts but that they would not order payment out of a blocked account to satisfy a judgment until the

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9 The Government, in the *Polish Relief* case, argued in support of the power of the New York courts to attach blocked funds, saying in its brief in that case at page 39:

> "The following portion of the Brief is offered as a suggestion that the courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."

payment had been subjected to the scrutiny contemplated by the Joint Resolution. *Singer* v. *Yokahama Specie Bank*, 293 N. Y. 543, in which the U. S. appeared as *amicus*; *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431, *aff'd.* 272 App. Div. 909, 72 N. Y. S. 2d 409, *aff'd.* 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Metallo-Chemical Corp.* v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596; *Bollack* v. *Societe General etc.*, 263 App. Div. 601, 33 N. Y. S. 2d 986, 990; *R. & E. Goldmuntz, Sp'l.* v. *Fisher*, 54 N. Y. S. 2d 635; *Drewry* v. *Onassis*, 188 N. Y. Misc. 912, 914, 69 N. Y. S. 2d 850, 851, *aff'd.* 272 App. Div. 870, 72 N. Y. S. 2d 262; *Cable & Wireless, Ltd.* v. *Yokahama Specie Bank*, 191 N. Y. Misc. 567, 79 N. Y. S. 2d 597; *Suomen Pankki* v. *Bell*, 80 N. Y. S. 2d 821, 829.

Respondent, Clark, has himself acknowledged the power of the state to deal with blocked funds, so long as payment is subjected to the screening process. It is a matter of record in *Clark* v. *Chase National Bank, et al.*,[10] Civil No. 44-617, lately pending in the Southern District of New York, that respondent, Clark, there stipulated, in part, as follows regarding the effect of the freezing controls:

> "6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was

[10] Cited in footnote 4 of respondent's memorandum in answer to the petition for certiorari.

required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

The Congress, the United States and the Courts of New York have all concurred in construing the Joint Resolution to permit the states to deal with blocked funds so long as the ultimate consummation of the transaction was subjected to the screening process. Therefore, it was competent for the State of New York, through §977-b, to vest the ASCAP debt in Propper as permanent receiver, so long as payment was subject to the scrutiny and license of the Federal executive. The contrary holdings below have erroneously construed Exec. Order 8389 to vest powers in the Executive which exceed those granted by the Joint Resolution.

CONCLUSION

The judgments of the Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the Brief.

APPENDIX

New York Civil Practice Act

(pp. 39-48 I. R.)

Sec. 977-b. *Receivers to liquidate local assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified com-

plaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six successive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made.

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated

or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and

a statement showing the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership.

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances.

15. Upon the return date of such application, or at such other time fixed by the court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the

plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto.

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts

of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile.

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor.

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation.

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or his predecessor in interest, of any asset of said corporation in the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared separable.

JOINT RESOLUTION of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations, as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

SEC. 3. Nothing in this Joint Resolution shall be deemed to repeal or to modify in any manner any of the provisions of the Act of April 13, 1934, 48 Stat. 574 (the Johnson Act) or of the Neutrality Act of 1939 (Public Resolution Numbered 54, Seventy-sixth Congress).

Approved, May 7, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 890

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—v.—

TOM C. CLARK, Attorney General as successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—v.—

TOM C. CLARK, Attorney General as successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I

Petitioner, as Temporary Receiver, took title to the ASCAP debt on the date of his appointment.

1. It is conceded that if Petitioner took title to the ASCAP debt upon his appointment as temporary receiver the judgments below must be reversed.

Respondent says the question of the temporary receiver's title is novel; that it has been decided below by "judges of

long experience"; and that, therefore, perfunctory approval should be given to the holdings below (Resp. brief, pp. 41-42). The case does not admit of routine review.

In construing §977-b, the judges below overlooked the fundamental guide-post in the case. They overlooked the fact—now all but admitted by respondent—that the temporary §977-b receiver is the device through whom the statute achieves *in rem* jurisdiction. They denied his title because they mistakenly likened him to the temporary equity receiver who acts as a mere custodian.

When the judges below have so utterly mistaken the purpose of the statute—despite its plain language and the Constitutional implications of their holdings—it is hardly appropriate to ask that their judgments be perfunctorily approved.

We are dealing here with one aspect of an important state statute frequently resorted to. Respondent says the question is "novel". If he means that no state case has raised or answered the question, we agree. We do not agree that the courts below should have undertaken the answer. By their answer they have excised the seizure device specified by the statute. The statute, as it emerges from their construction, authorizes an *in rem* judgment without prior seizure of the *res*—a result which has been unconstitutional since *Pennoyer* v. *Neff*, 95 U. S. 715.

This Court has repeatedly expressed its reluctance and, indeed, has declined to construe state statutes in cases such as this. *Mussser* v. *Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171; *Railroad Com. of Texas* v. *Pullman Co.*, 312 U. S. 496, 500; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101. We urged below—and reiterate here—that the important question of state law here involved be referred to the state court in line with the policy espoused by these cases.

Respondent says that the federal courts should put aside their reluctance here because "unusually important federal rights"[1] are involved. Referral to the State Court cannot be decided by balancing the importance of the opposing rights asserted. In enacting §977-b, the State of New York exercised the exclusive power, reserved to it by the Federal Constitution (10th Amend.), to deal with property within its borders. This power is, at least, of equal dignity with the Congressional authority which respondent seeks to implement in this case.

* * * * *

Respondent repeats his arguments which led the courts below to conclude that the temporary §977-b receiver does not take title. These arguments rest on (a) his construction of the statute and (b) his analogy of the temporary §977-b receiver with the temporary equity receiver. We believe that his argument is fallacious in both aspects.

2. We agree with respondent that §977-b must be read as a whole to ascertain its true meaning. Neither respondent nor the courts below have done this. Otherwise, they would have construed the statute in the light of the scheme—obvious from its terms—to achieve, through the temporary receiver, *in rem* jurisdiction adequate to deal with *all* the assets of the foreign corporation.

Respondent does not deny that the statute embraces a plan for *in rem* jurisdiction over *all* the local assets of the defunct foreign corporation. He does not dispute the need for a seizure device to effect the *in rem* jurisdiction con-

---

1 The issue here is whether under New York law AKM continued to have any interest in the ASCAP debt after the appointment of the temporary §977-b receiver. If it did have such an interest, concededly, the Custodian is entitled to it. Respondent, a federal officer, is merely asserting AKM's rights, if any, under State law. *Ergo*, there is no "important federal right" or, indeed, *any* federal right involved here.

templated. Nor does he deny that the temporary receiver is this device. He argues only that the seizure is completed —not when the temporary receiver is appointed, but—when notice of the appointment is given to someone holding *some* property of the corporation. The argument misconceives the nature of *in rem* proceedings.

Seizure for jurisdictional purposes is a provisional remedy. The jurisdiction of the Court attaches when the provisional remedy is granted.[2] But continued jurisdiction may be conditioned upon some act to be done thereafter. *N. Y. Civil Practice Act*, §825.

Here the provisional remedy was granted when petitioner was appointed temporary receiver and simultaneously vested with title[3] (§977-b, subd. 4, 19). Jurisdiction then attached. It was an *in rem* jurisdiction over *all* the assets

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2 Respondent (Brief, p. 49, n. 36) says that the §977-b action is commenced upon issuance of the summons which occurs after the temporary receiver has served the copy of the order of his appointment. The statement is erroneous. *First*, under subd. 4, the summons must issue before or concurrently with the application for the appointment of the temporary receiver. *Second*, since the provisional remedy of seizure is involved here, jurisdiction attaches and the action is commenced upon the grant of the provisional remedy i.e. the appointment of the temporary receiver. *N. Y. Civil Practice Act*, §825. Respondent has confused commencement of the action with service of the summons by publication.

3 Respondent argues (Brief, p. 44, n. 34) that the record does not show that the temporary receiver qualified by filing his bond before June 14, 1941. (The burden was on respondent, as plaintiff, to develop the facts necessary to his case.) He cited cases to show that under New York Law other receivers acquire no rights until they have so qualified. The argument is inapt. §977-b, subd. 19, vests title in the temporary receiver on the *making* of the order appointing him—not upon his compliance with the direction to furnish security. Moreover, the New York cases are clear that, when the receiver qualifies, his rights relate back to the date of the order appointing him. *Matter of Lenox Corp.*, 57 App. Div. 515, *affd.* 167 N. Y. 623; *Matter of Christian Jensen Co.*, 128 N. Y. 550, 553; *Peo. v. Community Live Poultry Corp.*, 127 Misc. 396; *Wilcox v. Natl Shoe & Leather Bank*, 67 App. Div. 446, 479.

of the Corporation provisionally seized by the appointment of the temporary receiver. However, continued jurisdiction was conditioned upon the giving of constructive notice of the seizure specified by subd. 5. It is not denied that such notice was given here. Therefore, the title taken by respondent upon his temporary appointment continued through to his appointment in his permanent capacity.

Respondent argues otherwise. He says, in effect, that subd. 5 prescribes the manner in which the *in rem* seizure must be made. He argues that, since, under subd. 5, service of the order appointing the temporary receiver upon a debtor of the corporation must be shown to support an order for constructive service by publication, it is this act—not the appointment of the temporary receiver—which effects the *in rem* seizure.[4] The argument is misconceived.

Subd. 5 does not specify when or how the seizure of *all* the assets occurs. It does not purport to deal with the seizure in any respect. It relates solely to the constructive notice of the action commenced by the seizure theretofore made. Subd. 19, alone, specifies when and how *all* the assets are seized for the purposes of the action. It is there clearly provided that *all* the assets are taken by the temporary

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4. So construed, the seizure would fail to achieve the purpose of the statute. The statute aims at *in rem* jurisdiction of *all* the local assets of the foreign corporation (subd. 4, 11). The service of the order and demand specified in subd. 5 is not co-extensive with this purpose. It requires merely that service be made on "*a* person * * * holding property * * * or against whom *a* claim * * * exists." Subd. 5 would be satisfied by service upon one of many local AKM debtors. But *in rem* jurisdiction of *all* the assets would require action against all of AKM's local debtors. This action is taken under subd. 19 which vests in the temporary receiver title to all of AKM's assets. Subd. 5 merely achieves constructive notice, by service of the order on *one* AKM debtor, of the seizure, made under subd. 19, of the claims owed to AKM by *all* of its debtors.

receiver "upon the making of the order" of his appointment. It is the *making* of this order—not subsequent service of the order or publication of the summons—which constitutes the seizure.

The reference in subd. 5 to service of the order appointing the temporary receiver is wholly appropriate to its theme. This subdivision deals with the constructive notice to be given of the commencement of the action. Such notice follows from publication of the summons. It follows, too, from service upon a debtor of the corporation of the order appointing the temporary receiver. Notice of the seizure thus given to its debtor is calculated to achieve notice to the corporation itself. "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation * * *". *Pennoyer* v. *Neff*, 95 U. S. 715, 727.

Respondent confuses the seizure (by entry of the order) with notice of the seizure (by service of the order). The

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5 Respondent argues that it is unlikely that the appointment of the temporary receiver was intended to vest him with title to all of the foreign corporation's local assets because his appointment is made "without notice to the corporation, and with no room for the exercise of the Court's discretion" (Brief, p. 46). These circumstances merely confirm the fact that the appointment of the temporary receiver effects a seizure for purposes of *in rem* jurisdiction. Seizure without notice is usual where the object of the seizure is the acquisition of *in rem* jurisdiction. *N. Y. Civil Practice Act* §§814, 815, 824. Since the Court's jurisdiction rests upon such seizure, there is no reason for the Court to exercise its discretion before it has acquired jurisdiction. The right to seize rests upon a *prima facie* showing of the facts upon which the statute conditions the seizure. Given these facts, the Court must take jurisdiction. *In personam* jurisdiction by personal service of summons does not rest on the Court's discretion. There is no reason why *in rem* jurisdiction should be so conditioned.

seizure of title through appointment of the temporary receiver—not the notice of the seizure through publication or service of the order—perfects the *in rem* jurisdiction. *N. Y. Civil Practice Act*, §825.

The most that can be said for respondent's argument is that service of the demand and order perfected the seizure as to ASCAP, the seizure as to AKM having been perfected by subd. 19.

3. Respondent's construction of §977-b—adopted below—rests upon a fallacious premise. He assumes, as the lower courts found, that the statute intends two receivers—one temporary, the other permanent. Relying on this premise, he scrutinizes the statute to ascertain which of its provisions can be said to apply to the temporary and which to the permanent receiver. In line with this approach he asserts that the "plan of the statute is chronological". Therefore, he says, the statute should be read as if divided into two "chapters". The first, he says, comprises subds. 1-9 and relates to the temporary receiver and other matters preliminary to judgment. The second, he alleges, comprises subd. 10 ff. and relates to the permanent receiver" (Resp.

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6 Respondent's assumption that Subds. 10ff of §977-b deal only with the permanent receiver, is belied by numerous instances to the contrary. For example, Subd. 14(c) obviously deals with the temporary receiver in fixing the date of his appointment as a factor in deciding the rank of claimants. Subd. 18 deals with the temporary receiver in fixing the time prior to his appointment plus three years as time which shall not be computed for the purpose of applying the statute of limitations. Subd. 19 deals with actions brought by and against the receiver and his substitution, and intervention, in, and revival of, pending actions. This subdivision obviously deals with the rights of the temporary, as well as the permanent, receiver. Subd. 20 deals with the manner in which "Any receiver" may take possession of the Corporation's assets. Respondent's argument that the temporary receiver takes only possession would make Subd. 20 peculiarly applicable to the temporary receiver. Subd. 21 and 22 are obviously applicable to the temporary, as well as the permanent, receiver.

brief, pp. 45-46). Therefore, he concludes, the title vesting clause of subd. 19 must be regarded as referring only to the permanent receiver.[7]

This analysis is unsound. The statute contemplates but one receiver. Prior to the amendment of subd. 10 in 1938, the statute contained no reference whatsoever to a "permanent receiver." The words "permanent receiver" were introduced only in subd. 10 by the 1938 amendment and do not appear in any other subdivision of the statute.

The pre-1938 version of subd. 10, provided that, if the allegations of the complaint were established, "the Court must thereupon direct judgment making permanent the appointment of the temporary receiver appointed pursuant to subdivision four hereof and directing the receiver to liquidate the assets * * * in the manner herein provided."[8]

Thus, it is seen that, initially, the statute contemplated only one receiver. Before judgment, his status was temporary. After judgment, it was permanent. The point of demarcation is not between temporary and permanent receiver. It is between the *duties* of "the receiver" before, and those after, the judgment. This explains why the subsequent sections of the statute merely refer to "the receiver".

Under the pre-1938 version of the statute, it was immaterial how the receiver was designated. He was one person whose activities—begun as temporary receiver—were com-

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7. The argument disregards the plain language of the statute. Subd. 19 vests title in the receiver who is appointed by "order". Only the temporary receiver is so appointed (Subd. 4). The permanent receiver is appointed by the judgment (Subd. 10). Throughout the statute the phrase "order appointing the receiver" is applied exclusively to the temporary receiver (Subd. 5, 8). It follows that the reference in Subd. 19 to the vesting of title in the receiver "upon the making of the order appointing him" pertains to the temporary receiver. *Pampanga Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218.

8 Gilbert-Bliss, *Civil Practice Act of New York*, note to §977-b.

pleted as permanent receiver. Therefore, the references to "the receiver", following subd. 10, referred to the receiver who, first, was temporary and, later, permanent, and not, as respondent argues, to the receiver who was permanent as distinguished from the one who was temporary.

The 1938 amendment of subd. 10 did not change the plan of the statute in this regard. It merely clarified it. As originally enacted, if read literally, there could be no receiver who was not first temporary and later permanent. This is because subd. 10 permitted the appointment, permanently, of *only* that person who had served as receiver temporarily. Since a temporary receiver could be appointed only where the proceeding was *in rem* (subd. 4), the statute failed to provide for any receiver where the action proceeded *in personam*.

The amendment of 1938 remedied this defect by changing subd. 10 to permit the appointment of a receiver by the judgment without regard to whether a temporary receiver had been appointed theretofore. This amendment was not designed to, and did not, change the plan of the statute. It did not divide it into two parts, one relating to the temporary receiver, the other to the permanent receiver.

The fact is that the statute, as originally drawn, while permitting the action to proceed on personal service, had been fashioned largely upon the assumption that *in rem* jurisdiction would have to be resorted to because personal service on defunct foreign corporations could rarely be accomplished. Where the action was *in rem* the temporary receiver by his appointment was given title to, and was commanded to take, *all* the assets. When his appointment was made permanent, he was commanded to liquidate and distribute *all* the assets. Under *Pennoyer* v. *Neff*, *supra*, after judgment, the receiver, in his permanent capacity,

could liquidate and distribute *only* what he had taken in his temporary capacity, prior to the judgment. The line of demarcation in the statute is not between temporary and permanent receiver. It is between the proceedings before, and those after, the judgment. Since the latter may be constitutionally directed only to the assets taken before the judgment, it would be logical to construe the statute to grant broad powers to the receiver, while temporary, to take the assets, in order to insure that the receiver, when permanent, would in fact have assets to liquidate and distribute. Cf. *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42.

4. Respondent argues that the temporary receiver is merely directed to "take, receive and reduce to his possession any and all assets" of the foreign corporation. This, he says, shows the limit of the temporary receiver's authority. To do this does not "make it appropriate that he take title to the corporate assets" (Resp. brief, p. 46). We believe that precisely the reverse is true.

The fault in respondent's reasoning—and this inheres in the opinions below—is that he confuses the functions of the receivers with their powers. The temporary receiver is commanded to take *all* of the assets. To this end he has all of the powers conferred upon him by subd. 12, in addition to the specific powers granted to him elsewhere in the statute. The permanent receiver is commanded to liquidate and distribute those assets. To this end, he, too, is endowed with the powers specified in subd. 12. These commands do not limit what the receivers may do—they direct what shall be done in any event. These directions to the respective receivers are definitions of function—not authority.

Where the proceeding is *in rem*, the permanent receiver may liquidate and distribute only those assets which have

been seized through the temporary receiver prior to the judgment. If the temporary receiver takes nothing the permanent receiver can distribute nothing. The statute (subd. 19) wisely vests title and broad powers in the temporary receiver, because the extent to which the temporary receiver succeeds in discharging his duty to take all the assets determines the extent to which the permanent receiver will succeed in discharging his duty to make distribution. It would be strange, indeed, if the statute gave broad powers to the permanent receiver to liquidate and distribute assets which, as temporary receiver, he had no, or only limited, power to acquire.

5. Respondent urges here—as he did with success below—that, by an analogy to the temporary equity receiver, the temporary §977-b receiver does not take title. We believe we have shown in our main brief (pp. 23-28, and N. 3) that no such analogy can be made.

Respondent is pressed to show why, if any analogy should be made, the temporary §977-b receiver should not be compared with the temporary receiver of a domestic corporation who, under *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, takes title. He intimates now (Resp. brf., p. 51) that, perhaps, the temporary §977-b is not to be compared with any other temporary receiver. This is precisely what we have argued. No comparison is necessary or permissible in the face of the clear direction in §977-b, subd. 19, that title vests in the temporary §977-b receiver upon his appointment. We cited the *Nealis* case only because we believed that if, an analogy were to be made, it should be an apt one.

Respondent would reject the authority of the *Nealis* case. There, he says, "The Court was loosely using the word 'title' in the sense of the receiver's statutory authority to

reduce assets to possession and to bring suits" (Resp. brf., pp. 51-52). The fact appears to be to the contrary because the court, as it explicitly states, used the term "title" in relation to "the important powers [including title] that are exercised by a permanent receiver."

The *Nealis* case—and the others which follow its authority—nullifies respondent's argument because he chose to premise his argument upon a label, "title". Syllogistically, his argument is as follows: (1) as between Petitioner (the temporary receiver) and respondent, he who has "title" must prevail; (2) a temporary receiver does not take title; (3) therefore, respondent must prevail. The *Nealis* case demonstrates that a temporary statutory receiver does take title. Therefore, it vitiates the minor premise of the syllogism and makes the conclusion false.

As we noted in our main brief, the Courts below begged the question in resting their holding on this label. Labels such as "title" do not signify why a particular holding is reached. They merely frame the result. Cf. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316.

We prefer to rest our position upon the fact that when the right to the ASCAP debt was vested, by §977-b, in Petitioner as temporary receiver, no residual interest was left in AKM upon which the Custodian's vesting order could operate. This is implicit in the fact that §977-b proposes, through the temporary receiver, to take all of the assets of the foreign corporation and to deal with them, exclusively, by the *in rem* judgment authorized by the statute. Once the assets were seized by the temporary receiver all that remained in AKM was the contingent expectancy that the assets seized would revert to it, if the action were terminated adversely to the plaintiff. Respondent, under the vesting order, could not and did not take more.

The plain purpose of the statute makes it clear that on June 12, 1941, AKM lost all right to dispose of, or deal with, its assets. That right cannot be restored to AKM—and thus to respondent—by indulging in the metaphysical exercise of determining what label shall be applied to describe the seizure legally effected under the statute.

6. Relying on *Markham* v. *Allen*, 326 U. S. 490, respondent asserts that the judgment below does not interfere with the State Court's *in rem* jurisdiction of the ASCAP debt because custody of the actual funds in suit is held neither by the State Court nor Petitioner but by ASCAP.

The argument overlooks the implications of the *in rem* seizure of a chose in action such as the ASCAP debt. In such cases, the nature of the intangible involved makes manual seizure impossible. Symbolic seizure is resorted to. In attachment cases, such seizure is effected by a declaration of seizure and an injunction against the attachment debtor. *N. Y. Civil Practice Act*, §§916(d), 917(2). Here, it follows from the vesting of title in the temporary receiver (§977-b, subd. 19) reinforced by punishment—as for a contempt—of those who interfere with his possession, *Ex parte Tyler*, 149 U. S. 164, 181. In law, such symbolic seizure—without actual seizure—vests the court with possession. *Chillicothe Furniture Co.* v. *Revelle*, C. C. A. 8th, 14 F. 2d 501, 504; *McKinney* v. *Landon*, 209 F. 360, 306; *Farmers Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51, 61; *Palmer* v. *Texas*, 212 U. S. 118, 129.

The Custodian's vesting order, involved here, was also an attempted symbolic seizure. *Great Northern Ry. Co.* v. *Sutherland*, 273 U. S. 182, 191.

Where, as here, two judicial seizures are attempted, concurrently, a collision of jurisdiction is inevitable.

The State Court's jurisdiction, by seizure at the commencement of the §977-b proceeding, attached first—long

before the Custodian invoked the jurisdiction of the courts below. Therefore, the State Court—to the exclusion of the lower federal courts—was, alone, empowered to hear and determine, in the first instance, the controversy now here for review. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229, 231; *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477, 478; *Ex parte Baldwin*, 291 U. S. 610, 615; *Murphy* v. *John Hoffman Co.*, 211 U. S. 562, 569; *Princess Lida* v. *Thompson*, 305 U. S. 456, 466; *Harken* v. *Brundage*, 276 U. S. 36.

The judgments below have charged the symbolic possession of the ASCAP debt from the State Court, which had it, to the respondent, who sought it. The Custodian's subsequent seizure has been made to prevail over that of the State Court. Deprived of the fruit of its seizure, the State Court's *in rem* judgment, appointing petitioner receiver, is deprived of all force and is rendered a nullity.

Respondent asserts that *Markham* v. *Allen*, *supra*, warrants the result here. There is no resemblance between the cases. In *Markham* v. *Allen*, this Court upheld the right of the federal court to declare the Custodian's rights on distribution of a decedent's estate as against the claims of the resident heirs. Only rights on distribution were involved. The Custodian did not—as he does here—challenge the right of the State Court *to hold, administer and distribute* the ASCAP debt. Here the judgment below—as distinguished from that in *Markham* v. *Allen*—is not "subordinate to every right" established by the state court decree and "effective only so far as it established rights derived" therefrom. *U. S.* v. *Klein*, 303 U. S. 276, 282. Here the judgment is in defiance of every such right and an unwarranted collateral attack on the State Court's judgment. *Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 88.

If were as if the ASCAP debt was in the hands of the State Court on the day preceding the judgment below and

in the hands of the Custodian on the day of the judgment. Plenary power to hold, administer and distribute the debt existed in the State Court on the former date. Nothing was left in the State Court on the latter date—not even jurisdiction to proceed with the action. The collision here with the State Court's jurisdiction was actual and annihilating.

II

The Freezing Controls Did Not Preclude the State of New York from Vesting the ASCAP Debt in Its Receiver.

Respondent argues, in effect, that the Joint Resolution expressly voids the judicial seizure of frozen funds and that, if found not to do so expressly, it must, nevertheless, be construed as though it did in order that its objectives be achieved. These objectives, he contends, require an all-embracing, unyielding, regulatory system giving to the President—to the utter exclusion of the states—sole power to deal with frozen funds.[9] As applied here, the argument is that the freezing controls not only precluded Petitioner from taking title to the ASCAP debt upon his permanent appointment but, in fact, voided and nullified, *retroactively*, the rights vested in Petitioner by his temporary appointment made before the effective date of the freezing controls.

At the outset, this argument meets the insuperable bar of constitutional limitations. Concededly, the power of the

9. Resp. brf. pp. 20, 23. The argument on page 20 of respondent's brief that no exceptions from the "area of control" were intended ignores the fact that transactions in "chattels" and "real property", as well as many other transactions, were not subjected to the controls. This is discussed in detail *post*, page 22.

Executive to nullify and vest in time of war has constitutional sanction. This is true only because §9 of the Trading with the Enemy Act complies with the dictates of due process by affording to the person, wrongfully deprived of his property, an effective remedy for the vindication of his rights.[10] The Joint Resolution affords no remedy. Lacking due process and absent the exigency of war, the Joint Resolution and Exec. Order 8389, in their application to Petitioner's rights, would be unconstitutional if given the force here asserted.

1. *The objectives and nature of the peacetime freezing controls.* An inherent weakness in respondent's argument is that it breathes into the Joint Resolution, passed in peacetime, objectives born of the subsequent war and its aftermath.[11] The Joint Resolution was fully adequate to accomplish its peacetime purpose. It was not shaped to the exigencies of war. Faced with this fact, respondent, for his purposes, is forced,—sometimes to the point of fantasy[12]—to stretch the Joint Resolution so as to encompass wartime objectives never intended or envisioned by Congress on May 7, 1940.

A preliminary observation is apt. The Joint Resolution provides no guides—other than defining the property and

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10 *Stirke* v. *Wallace*, 255 U. S. 239, 245; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79. It should be noted that the advent of war does not abrogate the protection afforded by the Fifth Amendment. *U. S.* v. *Colten Grocery Co.*, 255 U. S. 81, 88.

11 The objectives of freezing control, as stated by respondent at pp. 34-37 of his brief, would require the impossible assumption that, when Congress passed the Joint Resolution on May 7, 1940, it envisioned and created a regulatory plan which would dovetail neatly into all of the exigencies of the later war and its consequences.

12 For instance, his argument that the Supreme Court of the State of New York, acting through its receiver, and ASCAP, a society of composers, are "banking institutions" within the meaning of Exec. Order 8389 (Resp. brf., p. 16).

transactions covered—to the manner in which the Executive may exercise the granted powers. It furnishes no standards by which it may be determined when the Executive may, or shall, license any transaction. It affords no remedy—in court or otherwise—to any person aggrieved by any action of the Executive.

Despite the fact that the Joint Resolution is lacking in these normal essentials to valid legislation, respondent argues here that the Executive was given unlimited power—to the exclusion of the States—to proscribe and nullify any and every unlicensed transaction in frozen property. It would be singular, indeed, if Congress intended, by a statute so vague and inadequate, to grant the unlimited power, and to achieve the retrospective force for which respondent contends. Such intention, if entertained by Congress, was worthy of a far better Congressional effort than this enactment exemplifies, particularly in the face of the constitutional mandate against the delegation of legislative power to the Executive and against the enactment of vague criminal statutes. Legislation delegating powers to the President—more expertly drawn and far more explicit than that here involved—failed to meet the test of constitutionality, despite the very crucial domestic crisis of 1933 which induced the legislation.[13]

The Joint Resolution must be read only in the light of the limited purpose for which it was enacted,[14] namely, to protect the assets here of nationals of Axis-invaded coun-

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13 *Schechter* v. *U. S.*, 295 U. S. 495 (involving the constitutionality of the National Industrial Recovery Act); *U. S.* v. *Butler*, 297 U. S. 1 (involving the constitutionality of the Agricultural Adjustment Act).

14 This purpose is to be found in the situation *then existing* "as it was pressed upon the attention" of Congress (*Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457, 463)—not in the exigencies of subsequent war-time events (*Penn. Mutual L. Ins. Co.* v. *Lederer*, 252 U. S. 523, 538).

tries consistently with the rights of American citizens against such assets." So read, the Joint Resolution establishes a regulatory scheme shaped to meet the emergency to which it was directed.

The Joint Resolution—except insofar as it extended the coverage to securities—re-enacted, almost verbatim, the 1933 version[16] of §5(b) of the Trading With the Enemy Act. The latter version, enacted to meet the banking crisis of 1933, limited the controls to transactions in money and credits. For that emergency, control of financial transactions was adequate. The Joint Resolution added the control of transactions in securities and thereby rendered the statute a means for protection—against the Axis—of all the mobile assets of the invaded countries.

These assets—credits, money and securities—were mobile assets, held, largely, by American banks. They comprised the bulk of the foreign assets involved.[17] Because of the facility with which these assets could be manipulated abroad, these alone, necessitated, and were subjected to, the controls. It was impossible, of course, to supervise or

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15 The Treasury expressed the peacetime purpose thus: "At its inception, Foreign Funds Control had as its primary purpose the protection of the assets within the United States of invaded countries in order to prevent their falling into the hands of the invaders and in order to protect American institutions from possible adverse claims." U. S. Treasury Dept., *Administration Of The Wartime Financial And Property Controls of the United States Government*, p. 3.

The added purpose to "preserve the property not only for its owners but for the benefit of Americans who may have claims" was asserted in Congress by Sen. Barkley and concurred in by Sen. Wagner. (86 Cong. Rec. 5966; our main brf., p. 46.)

16 48 STAT. 1. The changes in the 1933 version of §5(b) of the Trading With the Enemy Act are shown graphically in H. Rep. No. 2009, 76th Cong., 3d Sess.

17 H. Rep. No. 2009, 76th Cong., 3d Sess; See analysis in U. S. Treasury, *Administration Of The Wartime Financial And Property Controls of The United States Government*, p. 40.

regulate transactions in these assets abroad. However, they could be regulated, effectively, by controlling the local incidents of such transactions—incidents indispensable to the fruition of the foreign dealings. Thus, withdrawal of funds on deposit in an American bank required payment by the bank located here. Transfer of the securities of an American company necessitated the transfer of the securities on the books of the Company's transfer agent or registrar—usually a banking institution—and the issuance of a new instrument. Accordingly, financial and securities transactions, originating abroad, were susceptible of regulation by a screening process applied to these incidents, necessary to consummation of the transactions.[18]

Since, in practice, foreign commercial transactions were conducted almost wholly through banking channels, the statute—shaped to control the activities of banks in the domestic banking crisis of 1933—was adequate, by controlling the transactions of banking institutions, to protect the mobile assets of the invaded countries. "As the direct application of the freezing control is effected principally through the banking system," the Treasury imposed "upon them [the banks] the primary responsibility for the enforcement of the provisions of the freezing Order and for the adherence to the terms of the licenses issued thereunder." U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government*, pp. 5-6.

Such a scheme was fully adequate to protect the funds and securities against the Axis invader even as against the possibility urged by respondent—but not mentioned by

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18 That this was the impact of freezing controls on transactions in securities is evident from the Treasury's explanation of the objective underlying General Ruling No. 3 (5 F. R. 2133). See U. S. Treasury Dept., *Administration Of The Wartime Financial And Property Controls Of the United States Government*, p. 21.

Congress—that protection was needed against "speculators." It was effective, without abrogating the constitutional power of the states to deal with local property, to meet the danger, purely hypothetical, that "speculators" would indulge in reckless speculation by purchasing blocked assets at a discount from the Axis. In any such case, a license could be withheld—thus suspending consummation of the purchase—until the true owner was able, in our courts, to test the speculator's title. No citation of authority is needed to establish that no American court would recognize the speculator's title based upon a theft committed at the point of Axis guns. With such protection afforded the true owner, we cannot, and should not, impute to Congress, in aiding the invaded countries, the purpose to strike down—at the expense of American citizens having legitimate claims—all power of the states to deal with frozen funds.

Viewed against the genuine objectives of the *peacetime* freezing controls, the Joint Resolution did not intend or promulgate an inflexible system of controls which would emasculate, in all respects, the usual power of the states to deal with property within their borders in the interests of their own citizens.[19] Congress granted no such permission to the Executive. The President made no attempt to exercise such authority. By Exec. Order 8389, he delegated to the Treasury, almost in the very terms of the Joint Resolution, those powers—and those only—which had been allowed to him by Congress.

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19. The respondent, in defending the claim that the Joint Resolution abrogated all State power over frozen property, likens this statute to the federal *wartime* controls of rents, manpower, credit, etc. premised on the constitutional power to wage war. The comparison is inapt. The Joint Resolution was a *peacetime* measure purely. It did not purport to, and could not, rest on the war powers. Further, in their impact on the rights of persons, even the wartime controls must satisfy the dictates of due process and other constitutional limitations. *Supra*, note 10.

From the foregoing, it will be seen that the peacetime freezing controls were simply a process for screening financial and securities transactions at the point of consummation, leaving untouched transactions not inimical to the purpose of the controls. This is exemplified by the Treasury's peacetime ruling that the judicial seizure of frozen funds for *in rem* jurisdiction—to enable litigation of American claims against blocked nationals—was permissible and wholly consistent with the peacetime freezing control program.[20]

When war came, broad powers were granted to the Secretary of the Treasury (by the First War Powers Act) to deal with the property of foreign nationals.[21] Despite his

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20 The ruling is discussed fully in our main brief, pp. 50-53 and note 9. The respondent has stipulated as a fact, in *Clark* v. *Chase National Bank* and *Clark* v. *Federal Reserve Bank*, unreported, S. D. N. Y. 1948, Civ. Nos. 44-617 and 44-618, that "From the inception of 'freezing' controls, all litigants who, prior to commencing attachment actions against funds belonging to blocked nationals, had requested the Secretary of the Treasury to license an attachment, or levy, received from the Treasury Department a response of the following nature:

> *"Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States.* However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national." (Italics ours.)

Exec. Order 8389 Sec. 1, authorized the Secretary of the Treasury to apply the order "by means of [such] * * * rulings, instructions * * * or otherwise."

This settled ruling of the Treasury Department constituted the common law of the Department, so to speak, and fixed the scope of the freezing controls as applied to judicial seizure of frozen funds. *U. S.* v. *Birdsall*, 233 U. S. 223; *U. S.* v. *Mac Daniel*, 7 Peters 1.

21 The President's powers under the First War Powers Act were delegated to the Secretary of the Treasury by Exec. Order 9193 (amending Exec. Order 9095 (7 F. R. 1971; 7 F. R. 5205; 10 F. R. 6917)).

broadened authority, the Secretary chose to apply the controls in war as he had in peace. Thus, by General Ruling No. 12, issued April 21, 1942 (7 F. R. 2991) he excluded "chattels," "real property" [Gen. Ruling No. 12, subd. 5(b)] and a host of other transfers[22] from the operation of the controls. In respect to litigation, he continued the policy, which he had announced in peacetime, of permitting judicial seizure of frozen funds—limiting application of the policy considerations underlying the controls to the point at which the judicial determination was to receive the sanction of payment.[23]

In this way, the Secretary left the controls in time of war precisely what they were in time of peace—control at the point of consummation—of financial and securities transactions only.

If respondent is correct in asserting that the freezing control program was meant to be all-embracing and to apply to all forms of property, it is inconceivable that the Secretary would, especially in the emergency of war, have exempted tangible property from the controls. "Chattels" and "real property"—as well as intangibles—were susceptible, though with less facility, to (a) Axis conquest (b) use to finance the Axis war effort and (c) administration as a part of the vesting program.[24]

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22 Some of those excluded were transfers by estate succession or testamentary disposition or to a judicially appointed estate fiduciary or such as resulted from change of marital status or were made pursuant to certain decrees of occupied Netherlands and Norway [General Ruling 12(5)(a) and (e)].

23 *Supra*, note 20.

24 These are the objectives ascribed to the freezing controls by respondent (Resp. brf., p. 34-7).

The plain conclusion to be drawn from the Treasury's handling of the freezing controls, both during peace and in war, is that the system was a flexible one, intended to be molded to achieve the Congressional objective of screening—at the point of consummation—transactions in the mobile property of blocked nationals[25] without prejudice to the rights of the states to enforce the legitimate claims of their citizens against such property.[26] The federal govern-

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25 Construction of The First War Powers Act with the Joint Resolution confirms the view that the latter was intended merely to set up a plan for limited regulation of transactions—not a property control.

The First War Powers Act, by Sec. 5(b)(1)(A), retains in substance the regulatory plan of the Joint Resolution. But in Sec. 5(b)(1)(B) a distinctly new power is granted. Under the latter, the President may "nullify" and "void" any "acquisition" or the exercise of "any right, power, or privilege with respect to, or transactions involving, any property" of a blocked national. And the power to "nullify" and "void" is complemented by power to the President to vest such property.

Sec. 5(b)(1)(B) in granting power to "nullify" and "void" "any acquisition" of "any property" indicates that something less than this was intended in (b)(1)(A). Otherwise, if (b)(1)(A) is construed to include the power to "nullify", the two sections are an aimless duplication—a result to be avoided. *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208.

The First War Powers Act changes the wording of the Joint Resolution in a significant manner. Power to "nullify" and "void", theretofore absent, is added in broad terms. The change is persuasive evidence of a changed Congressional purpose—to grant the power to nullify where none existed before. *Brewster* v. *Gage*, 280 U. S. 327, 337; *Crawford* v. *Burke*, 195 U. S. 176, 189.

The change is the more apparent here because the substance of the Joint Resolution is retained [in (b)(1)(A)] in juxtaposition to the new power granted.

By the First War Powers Act, Congress has made it clear that it was capable of language competent to grant the power to nullify when it so intended. By the same token, the omission of such language from the Joint Resolution of May 7, 1940 (with which, alone, we are concerned here) is a clear indication that no power to nullify was then intended.

26 *Supra*, note 20.

ment had no concern with who should hold the funds or credits or who should own them ultimately, so long as the ultimate owner did not acquire them for the Axis.

We have adverted to the wartime administration of the freezing controls—though they are not germane, to determine the peacetime rights here involved[27]—only because it shows the consistent purpose of the Treasury to limit the controls to their initial purpose of screening, at the point of consummation, financial and security transactions only.

With freezing controls, limited expressly and by purpose to transactions inimical to the Joint Resolution,[28] it is not surprising that the Treasury should have ruled, as it consistently did, that the judicial seizure of frozen funds for jurisdictional purposes was in harmony with, and permitted by, the program.

2. *The freezing controls in relation to litigation involving frozen funds.* Obviously, litigation in respect to frozen funds could not possibly conflict with the genuine objectives of the freezing controls, if the screening process could be applied at the point of consummation of the rights adjudicated.[29] This point would be reached when the judgment was about to receive the sanction of payment.

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27 *Post*, note 32.

28 The Treasury acknowledged that there were many transactions in frozen assets "which are not in any way inimical to the purposes of the Control". U. S. Treas. Dept., *Administration Of The Wartime Financial and Property Controls Of The United States Government*, p. 6.

29 The argument that it was necessary to proscribe transfers by the judicial process to avoid collusive transfers as the result of default judgments, deliberately acquiesced in (resp. brf., p. 19), is a *non sequitur*. The judgment—whether contested or on default—could not be satisfied until the payment had been screened.

The Secretary of the Treasury understood this fully when he ruled, uniformly, that an unlicensed judicial seizure of frozen funds for *in rem* jurisdiction in actions brought to enforce claims of American citizens against blocked nationals was impermissible and wholly consistent with the peacetime freezing control program.[30] In line with this ruling, litigation—including cases of *in limine* seizure of frozen funds—proceeded unhampered until the point at which the judgment was to be paid. Then, and only then, the freezing controls intervened to screen the payment.[31]

The courts below have held otherwise here, despite the fact that the *in rem* seizure of the ASCAP debt in the §977-b. proceeding was wholly a *peacetime* transaction. They rested their decisions on the notion, *first*, that the freezing controls embraced all transactions and all property and, *second*, that General Ruling No. 12 prohibited judicial seizures and was competent, retroactively,[32] to avoid Petitioner's right to the ASCAP debt. We have already noted the constitutional limitations which would

30 *Supra*, note 20.

31 The New York courts experienced no difficulty in carrying out the purpose of freezing controls in conformity with the Treasury's rulings. For example, in *Bollack* v. *Societe Generale etc.* (1st Dept. 1942), 264 App. Div. 601, the Court said:

> "* * * As we regard the order [8389], compliance therewith is a condition of the execution of any judgment that may be entered in favor of plaintiff here. The defendant is entitled in any such judgment rendered against it to a provision that such judgment is not payable except on full compliance with whatever legal regulations are in force at such time. * * *"

32 Administrative orders and rulings, as well as statutes, may not be construed to operate retrospectively. *Miller* v. *U. S.*, 294 U. S. 435, 439. Where, as here, the administrative order has the sanction of the criminal laws [See Exec. Order 8389, Sec. 8], such retrospective application is forbidden by Constitutional limitations. *Addy* v. *U. S.*, 264 U. S. 239, 244-5; *Chew Heong* v. *U. S.*, 112 U. S. 536.

deny the thrust of General Ruling No. 12, if so directed, against rights acquired in peacetime. But, passing this, General Ruling No. 12 could in no legitimate sense, be given the meaning ascribed to it by the courts below.

Subd. 4 of Gen. Ruling No. 12, in the opening clause, provides that "any [unlicensed] transfer affected by the Order [8389] * * * involved in * * * any action * * * in any Court within the United States" is "valid and enforceable for the purpose of determining for the parties to the action * * * the rights and liabilities therein litigated." This opening clause is followed by the proviso that no judicial process may create a greater interest in a blocked account "than the owner of such property could create or confer by voluntary act prior to issuance of an appropriate license."

Had the proviso stated in substance that "payment could not be made out of a blocked account to satisfy the judgment in the absence of license," General Ruling No. 12 would merely have enacted, in more legalistic verbiage, the Treasury's position and rulings that the peacetime freezing controls permitted unlicensed transfers of frozen funds for the purposes of litigation. That the change was merely in language—not in substance—appears from the statement in Treasury's Press Release No. 34 where, in speaking of Gen. Ruling 12, subd. 4, it is said that "the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the *results* of court proceedings are subject to the same policy considerations from the point of view of freezing control as those arising through the voluntary action of the parties." (Italics ours.) This is to say, in effect, that it is the *result* of the litigation, *i.e.* the *judgment*, which is subject to the screening process. This view of Gen. Ruling No. 12, subd.

4, is wholly in harmony with the penetrative application of freezing controls to litigation based on judicial seizure.

However, the language actually used in the proviso of subd. 4, has given rise to respondent's argument, accepted below, that despite the broad grant in the opening clause of subd. 4, the proviso renders frozen funds incapable of judicial seizure.

The difficulty with respondent's construction of Subd. 4 is that, in practice, it would bring about utterly conflicting consequences, dependent upon whether the litigation was *in personam* or *in rem*—a result wholly unintended by anything which appears anywhere in the Ruling.

It is clear that the Ruling intends to permit actions competent validly to determine "the rights or liabilities therein litigated." Respondent's construction of the Ruling would not interfere with this purpose in the case of *in personam* actions. In such case, the personal service of the summons would provide the constitutional basis for a binding judgment fixing the rights of the parties. In such case, the validity of the judgment would in no way depend upon whether a post-judgment, unlicensed, judicial seizure, by execution, garnishment etc., was effective to create an interest in frozen funds.

Where the action was *in rem* and proceeded on constructive service, precisely the opposite would be true. In such case, the constitutional prerequisite to a binding judgment fixing the rights of the parties, is the judicial seizure, *in limine*, of the property to be dealt with by the judgment. This is because, where the action is *in rem*, the rights of the parties are determined only in respect to the property seized prior to the judgment. If, as respondent contends, the proviso of subd. 4 precludes a judicial seizure without license, no valid *in rem* judgment would be possible, despite the absence in the Gen. Ruling of any purpose to differentiate between actions *in rem* and actions *in personam*.

To construe the General Ruling as authorizing the judicial seizure of frozen funds is to make it valid and meaningful. To construe it as respondent contends is to make it illogical, contradictory and useless. Given this choice, the interpretation which is meaningful should be adopted. *U. S.* v. *Chemical Foundation*, 272 U. S. 1, 13; *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627, 640.

From the foregoing, it is evident that the Treasury's administration of the freezing controls did not, either in peacetime or during war, abrogate the power of the state to seize frozen funds for the purpose of achieving *in rem* jurisdiction.

3. *The express language of the Joint Resolution and Executive Order 8389 confirms the scope of the freezing controls as above outlined.* Respondent—having argued that the peacetime freezing controls were unyielding in their purpose to proscribe *all* transactions in frozen funds unless licensed—is forced to stretch the language of the Joint Resolution and the Exec. Order 8389 to meet the breadth of his argument. The result is an unrealistic and even fanciful construction of these documents.

He admits that transactions in frozen funds are not prevented by Subd. 1B of the Order which relates only to "*payments* by or to any banking institution." (Italics supplied) However, he says, that Petitioner's acquisition of the ASCAI debt, as permanent receiver, would be proscribed either under Subd. 1A of the Order as a "transfer of credit between * * * banking institutions" or under Subd. 1E of the Order as a "transfer * * * of, or dealing in * * * evidences of indebtedness or evidences of ownership of property * * *" (Resp. Brf. pp. 16, 17).

It should be noted that, in view of the Treasury's rulings, *supra*, note 20, that unlicensed judicial seizure of frozen funds was "not forbidden" by the freezing controls, it is really immaterial whether we regard the seizure of the ASCAI debt as a "transfer of credit between * * * banking institutions" or the transfer of an "evidence of indebtedness". The seizure, however, labelled, had the express sanction of the Secretary of the Treasury.

To apply subd. 1A of the Order here, we should have to say that the State of New York, acting through its receiver, and ASCAP, a society of musical composers, are "banking institutions". This would be to stretch the definition of "banking institutions" to the point of utter fantasy. Reasonably read, subd. 5E of the Order lends no support to such a fanciful construction of the term. Neither, ASCAP nor Petitioner, as receiver, could qualify for the part assigned to banking institutions by the freezing controls. *Supra*, p. 19.

Moreover, given his construction of Subd. 1A respondent's argument would still be fatally defective, since the statutory vesting of title in the §977-b receiver is, in no sense, a "transfer of credit" within the meaning of the subdivision. The reference to transfers of "credits between, * * * banking institutions" was first introduced into Sec. 5(b) of the Trading With the Enemy Act by the amendment made in 1933[35] to enable the President to halt the then current runs on banks. The reference was necessary to meet the banking emergency, for transfers of credits between banks, equally with actual payment, affected the stability of our banking institutions then in danger. Nothing in the §977-b proceeding resembles, even remotely, the "transfer of credit" envisioned by the statute.

Respondent's alternative contention is that the state court's seizure of the ASCAP debt is a transfer of an evidence of indebtedness or of ownership of property within the meaning of Sec. 5E of the Exec. Order. Citing criminal cases decided in Pennsylvania and Oklahoma, he argues that evidence of indebtedness refers to any legal evidence sufficient to establish the debt. From this he concludes—by a process of unfathomable reasoning (Resp. brf. pp. 17-18)—that the making of the judgment appoint-

35 48 Stat. 1, Public Law, No. 1, 73d Cong.

ing Petitioner permanent receiver somehow involves the transfer of an evidence of indebtedness.

We are spared the task of divining this argument. As used by Congress in the Joint Resolution, the meaning of the phrase, "evidences of indebtedness," is not in doubt. The phrase was inserted into the statute solely to bring stocks and bonds within the regulatory scheme. Prior to the enactment of the Joint Resolution, the Treasury had ruled that stocks and bonds were covered by the statute (Gen. Ruling No. 2; 5 F. R. 1474). Certain New York banks challenged the ruling. The phrases "evidences of indebtedness" and "evidences of ownership of property" were inserted to resolve the doubt[36] and to make explicit that which the Treasury had inferred—namely, that transfers of stocks and bonds were within the plan of the statute. This is inescapable from the following statement by the Treasury itself, at whose urging the Joint Resolution was adopted:

"Y. SECURITIES

"When the first Executive Order establishing the freezing control was issued on April 10, 1940, it was realized that if the Control was to be effective in preventing the assets of the invaded countries from falling into the hands of the invaders and being liquidated by them, a method must be found to prevent the looting and disposition of securities. Although the Order as issued contained no specific reference to securities, it was the purpose of this Government in issuing the Order to include the control of securities within its scope. Some question arose, however,

36 H. Rep. No. 2009, 76th Cong. 3d Sess. 1940; S. Rep. 1946, 76th Cong. 3d Sess. 1940; Senator Wagner in 86 Cong. Rec. 3006; *U. S.* v. *Leiner*, 143 F. 2d 298.

at the outset, as to whether the Trading With the Enemy Act of the First World War, upon which the Order was based, gave authority for the extension of the Control to securities. The Treasury Department immediately clarified its position on this question by issuing General Ruling No. 2 and stating that the Control did extend to securities. *In order, however, to erase any doubt which might have existed, Congress immediately enacted supplementary legislation pursuant to which the Order was amended so as clearly to include securities within the scope of the Control.* This action of the Treasury Department and of Congress is a striking example of how a situation needing prompt handling was met promptly. Had delay occurred, it would have undoubtedly allowed tremendous quantities of securities to escape our control."[37] (*Italics supplied*)

The plain fact of the matter is that, if any part of the Order applied to the judicial seizure of frozen funds, it was subd. 1B solely. The Treasury's peacetime application of the freezing controls makes this unmistakable. It is impossible to rationalize, on any other basis, the Treasury's consistent rulings—acknowledged by respondent—that every act directed to the seizure of frozen funds in *in rem* actions could proceed unlicensed and that only the final act of payment of the judgment required the sanction of a license.

The basic fault in respondent's argument is that it overlooks the fact that the freezing controls regulated only *transactions* in frozen funds as distinguished from the funds themselves. Not all such transactions were inimical to the purpose underlying the freezing controls. As noted, the

37 U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 20-1.

Treasury ruled, early in its peacetime administration of the program, that judicial seizure of frozen funds for jurisdictional purposes not only was not in conflict with that purpose but, indeed, was in aid of it.

If despite this ruling, the Treasury actually intended otherwise, it perpetrated a gross fraud when it encouraged litigants to attach frozen funds[38] and urged upon the highest court of the state of New York[39] its conclusion that the courts had power—consistently with freezing controls—to seize frozen funds for jurisdictional purposes. No such indictment of the Treasury need be made. It is the respondent—not the Treasury—who seeks here to reverse the position of the United States.

While, after passage, in wartime, of the First War Powers Act, the Executive had ample power to "nullify" and "void"—prospectively only—as well as to "freeze" blocked funds he chose not to do so. Instead he continued the freezing controls as a flexible regulatory plan directed only to transactions hostile to the object of the Controls. He continued, as in peacetime, to regard judicial seizure of frozen funds for jurisdictional purposes as a permissible transaction—in no wise inimical to the freezing program (Gen. Ruling No. 12, Subd. 4).

4. *As to the judicial precedents.* The respondent stands largely on the judicial precedents of the New York federal courts. *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, Feb. 21, 1949, was decided by the Federal Court of Appeals subsequently to the instant case and expressly rests upon the authority of this case. *Clark* v.

38 *Supra*, note 20.

39 See our main brief, page 51, note 9.

Chase National Bank, Clark v. Federal Reserve Bank, and *Heyden Chemical Co. v. Clark*; S. D. N. Y., 1948, were all decided subsequently to the instant case and, also, rest expressly upon its authority.

The New York Court of Appeals has thrice passed upon the same issue as is here involved. In *Polish Relief v. Banca Nationala a Rumaniei*, 288 N. Y. 332, at the urging of the Treasury as *amicus curiae*, The New York Court of Appeals expressly followed the Treasury's construction of the freezing controls to authorize the judicial seizure of frozen funds for jurisdictional purposes. Any question as to the force of this holding, so far as the New York Court of Appeals is concerned, was wholly removed by its decision in *Singer v. Yokohama Specie Bank*, 293 N. Y. 542. The latter case construed General Ruling No. 12 and must be considered to have held, precisely in accordance with the view of the Treasury, that in war as in peace the freezing controls did not proscribe litigation with regard to frozen funds. See also *Leeds v. Guaranty Trust Co.*, 272 App. Div. 909, aff'd. 297 N. Y. 1019.

We believe that the divergence in holdings between the New York State Court of Appeals and the New York Federal Courts stems entirely from the latter's misunderstanding of the freezing controls which we have fully discussed here. The Treasury, as its rulings show, never regarded the freezing controls as interfering with litigation, except at the point of consummation by payment of the judgment. Respondent has succeeded in reversing this Treasury ruling by his contrary interpretation of freezing controls—a construction for which he has gained acceptance below.

Respondent, as head of the Office of Alien Property, is interested primarily in vesting foreign property in him.

self. To this end, he has given to the freezing controls a construction never before countenanced. By so doing, he seeks to immobilize frozen property until it suits his convenience to vest. Given this construction, freezing controls are a mere tool for broadening the scope of the vesting power. He has been aided in this objective by the fact that now he—to the exclusion of the Treasury—administers the freezing controls as well as the vesting powers of the President (Exec. Order 9989; 13 F. R. 489).

We respectfully submit that the authorities which are significant here are those in the New York Court of Appeals which construed the freezing control before it was conceived of by respondent as a convenient device for improperly extending the scope of the vesting power.

CONCLUSION

The judgments of the Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

A. WALTER SOCOLOW,
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JOSEPH M. COHEN,
On the Brief.

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No. 396

In the Supreme Court of the United States

OCTOBER TERM, 1948

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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v.

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MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (II R. 40) is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.

JURISDICTION

The judgment of the Court of Appeals was rendered August 3, 1948 (II R. 47). The petition for writ of certiorari was filed October 30,

1948. The jurisdiction of this Court is founded on the provisions of Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether, in the absence of a federal license, the appointment of a permanent receiver by a state court can confer on the receiver title to assets which had previously been frozen pursuant to Section 5(b) of the Trading with the Enemy Act and Executive Order No. 8389.

2. Whether, under the provisions of Section 977-b of the New York Civil Practice Act, the petitioner acquired title to the assets of the Austrian association by virtue of his appointment as temporary receiver.

3. Whether the federal district court was precluded from adjudicating the respective claims of the petitioner and the Alien Property Custodian to a fund in the hands of a third party, by reason of the fact that the petitioner's claim was based on his appointment as receiver by a state court.

STATUTE INVOLVED

The relevant partions of Section 5(b) of the Trading with the Enemy Act, 40 Stat. 411, as amended, 55 Stat. 839; 50 U.S.C. App. Section 5(b) are set out in the Appendix (infra, p. 13).

STATEMENT

This action was begun on April 22, 1946, in the District Court for the Southern District of New

York by the Alien Property Custodian[1] to enforce certain portions of a vesting order (Vesting Order No. 2097, 1 R. 112-5) by which the Custodian had vested all rights of various named European societies under copyrights for the performance of musical compositions. The complaint (I R. 5), in three counts, alleged that certain royalties were owing by the defendant, American Society of Composers, Authors and Publishers (hereinafter referred to as "ASCAP") to three of the societies named in the vesting order and sought the payment to the Custodian of those royalties. The second count of the complaint, with which alone the present petition for writ of certiorari is concerned, claimed royalties allegedly owing to an Austrian cooperative association, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger (hereinafter referred to as "A.K.M."). That count named the petitioner as a co-defendant, alleging that he had made claim to the funds. The complaint prayed that the court adjudge that the Custodian had by virtue of the vesting order acquired full title to the indebtedness of ASCAP to A.K.M., that the petitioner had no title superior to that of the Custodian, and that the Custodian recover judgment against ASCAP for the royalties claimed.

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[1] Tom C. Clark, Attorney General as Successor to the Alien Property Custodian was duly substituted for James E. Markham, as Alien Property Custodian (I R. 150). The term "Custodian" will be used herein to refer to the original or the substituted plaintiff as the context may indicate.

On motions for judgment on the pleadings or for summary judgment filed by petitioner (I. R. 70) and the Custodian (I R. 92), the District Court, on February 10, 1947, entered a judgment declaring that petitioner has no right, title or interest to the funds which were the subject of the second count (I R. 153). Thereafter judgment was entered against ASCAP on November 21, 1947, directing it to pay over to the Custodian the amount of $46,839.54 (II R. 25). On appeal by the petitioner the judgments of the District Court were affirmed unanimously by the Court of Appeals on the merits (II R. 40).[2]

The facts relating to the petitioner's claim of title to the indebtedness which was the subject matter of the second count are as follows. On June 12, 1941, on ex parte application by a creditor of A.K.M., the Supreme Court for New York County, acting pursuant to Section 977-b of the Civil Practice Act of New York, appointed the petitioner temporary receiver of the assets in New York of A.K.M. (I R. 49). Two days later, on June 14, 1941, Executive Order No. 8389 (5 F.R. 1400) was amended to include Austria and nationals of Austria among those whose property was subject to freezing controls (Executive Order No. 8785, 6 F. R. 2897, Appendix, p. 15, infra).

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[2] This was the second appeal by petitioner, an earlier appeal having been dismissed as premature, 163 F. 2d 940, ASCAP having stipulated to the entry of the judgment against it, did not appeal.

No license has been applied for or issued permitting petitioner to engage in any transaction involving property of A.K.M. (I R. 110).

On September 29, 1941, petitioner was appointed permanent receiver of A.K.M. (I R. 56). Petitioner has reduced no assets to possession and has made no disposition to creditors (I R. 95). An action in the New York courts against ASCAP to recover the sums allegedly owed by it to A.K.M. was instituted by him on July 29, 1941 (I R. 96). Its disposition is awaiting outcome of the present proceeding (I R. 117-123).

DISCUSSION

I. The petitioner contends that he acquired title to the New York assets of A.K.M., including the fund here in suit, by his appointment as permanent receiver. We think the court below was clearly correct in holding that because the fund had been frozen by Executive Order No. 8389 more than three months prior to petitioner's appointment, that appointment was ineffective to confer on petitioner any right to the fund.

Executive Order No. 8389 was issued pursuant to Section 5(b) of the Trading with the Enemy Act, as amended May 7, 1940, 54 Stat. 179, 50 U.S.C. App. Sec. 5(b). Its text (Appendix p. 15), patterned directly on that of the statute, is unequivocal. It prohibits, unless licensed, all "transfers" or "dealings in" any "evidences of indebtedness" if the prohibited transactions in-

volve property in which a "national" of a country designated in the order has an interest. There can be no dispute that A.K.M. was such a "national" and that the acquisition of title by petitioner to an evidence of indebtedness (ASCAP's books of account and the indebtedness to A.K.M. shown thereon) in which A.K.M. had an interest was prohibited by the Order.

Petitioner apparently does not dispute that the Executive Order would have prevented ASCAP from making a voluntary transfer of the indebtedness to a third person; his argument is that a transfer of title by court order (the order appointing him permanent receiver) is exempt from the prohibitions of the Executive Order. As the Court of Appeals pointed out (II R. 45), there could be no conceivable reason for creating such an obvious loophole in the statutory scheme, which was designed to immobilize all foreign assets except as transfers of those assets were permitted by appropriate federal license. And there is no warrant in the terms of the Order for reading into it such an exception. Any possible doubt on the point, moreover, is removed by General Ruling No. 12, issued by the Secretary of the Treasury on April 21, 1942 (7 F. R. 2991, Appendix p. 15, infra). That Ruling explicitly declares that any transfers of blocked (i.e., frozen) property after the effective date of the Order are prohibited; it defines property as including "debts" and "claims" and defines "trans-

fer" as including any "judgment . . . or other judicial or administrative process or order". And paragraph 4 of the Ruling specifically provides that no attachment, judgment or other judicial process shall confer any greater right in blocked property than could be created by voluntary act.[3]

Although we believe that the decision of the Court of Appeals is clearly correct, we do not oppose the petition in so far as it seeks review on this point. The question of the effectiveness of an unlicensed transaction which comes within the prohibitions of Executive Order No. 8389 is one of fundamental importance under the Trading

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[3] The petitioner's further arguments—that the decision below denies full faith and credit to the judgments of the New York Supreme Court and destroys vested rights of the petitioner and others in the debt—assume the point to be decided. The judgments of the New York Supreme Court do not purport to be an adjudication that title to the present debt had passed to the petitioner, or to confer any rights on the petitioner which he could not lawfully acquire under the federal freezing regulations. In the absence of the most explicit language to the contrary, those judgments should be construed as being in conformity with the applicable federal regulations, which under the supremacy clause of the Constitution, Art. VI, Cl. 2, formed part of the law of New York. In any event, a judgment in violation of the freezing regulations would not be binding on the federal court. Cf. *Kalb* v. *Feuerstein*, 308 U. S. 433.

Similarly, the argument that the petitioner or third parties had acquired liens in the debt by virtue of the receivership proceeding or of the subsequent action brought by petitioner against ASCAP in the state courts necessarily assumes that property interests could be created in the debt after the effective date of Executive Order No. 8389.

It should be pointed out that the judgment below will not deprive creditors of A.K.M. of an opportunity to satisfy their claims out of the debt here in question or out of any other United States asset of A.K.M. See Trading with the Enemy Act, Sec. 34; 60 Stat. 925, 50 U.S.C. App. Sec. 34; *Cabell* v. *Markham*, 69 F. Supp. 640 (S.D.N.Y.).

with the Enemy Act. It has arisen in a wide variety of cases in various jurisdictions,[4] and the decisions have not been uniform. In particular, the state courts of New York[5] apparently adhere to views which are divergent from those which have been adopted by the court below. See e.g. *Singer* v. *Yokohama Specie Bank*,[6] 293 N.Y. 542, 58 N.E. 2d 726; *Leeds* v. *Guaranty Trust Co.*, 65 N.Y. Supp. 2d 431, affirmed, 272 App. Div. 909, affirmed, 297 N.Y. 1019. Their view apparently rests either on the notion that the Executive Order merely prohibits payment or physical de-

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[4] In addition to the cases cited at pp. 15-16 of the petition, see e.g. *Okihara* v. *Clark*, 71 F. Supp. 319, 322-3 (D. Hawaii, 1947); *The Kotkas*, 35 F. Supp. 983 (E.D.N.Y.); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, 76 F. Supp. 335 (S.D.N.Y.); *Clark* v. *Chase National Bank, et al.*, decided Oct. 1, 1948 (S.D.N.Y.); *Heyden Chemical Co.* v. *Clark*, decided Oct. 15, 1948 (S.D.N.Y.); *Blank* v. *Clark*, 79 F. Supp. 373 (E.D.Pa.). And see generally Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems, 17, 44-9 (1945); Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N.Y.L.J. 2180, 2200 (1945).

[5] The views adopted by the New York state courts are particularly important because of the great volume of litigation relating to the freezing controls which has arisen within the geographical boundaries of that state—a reflection of the centralization there of international banking and financial business.

[6] The *Singer* case is again before the New York Court of Appeals after trial, motion for leave to appeal having been granted on October 7, 1948. Counsel for the New York Superintendent of Banks have requested the New York Court to reconsider its prior decision in the light of the express refusal of the court below to follow it (II R. 45). The United States, in a brief *amicus curiae*, has joined in that request.

livery of blocked property but does not prohibit transfers of ownership to such property, or that transfers by judicial order are excepted from the prohibitions of the federal freezing regulations. Neither notion finds any support in the text of the Executive Order or the regulations and rulings thereunder, and acceptance of either would seriously impair the effectiveness of the federal controls. Accordingly, we believe that it would be desirable to have this Court review the question at the present time in order to resolve the apparent conflicts of judicial decision which have developed.

II. The petitioner argues further that he acquired title to the fund by his appointment as temporary receiver two days prior to the effective date of Executive Order No. 8389 and hence that his claim to the fund is unaffected by that Order. His contentions on this point raise only questions of the construction of a state statute which do not merit review by this Court. The holding of both courts below that a temporary receiver appointed in an ex parte proceeding under Section 977-b of the New York Civil Practice Act does not take title to any assets is in accordance with the statutory language and consistent with the general rule applicable in New York as to temporary receivers. The petition alleges no conflict with any decision of the New York courts and we have found none. The petitioner's further contention that his subsequent appointment as permanent

receiver conferred upon him a title which related back to the date of his appointment as temporary receiver also finds no support in the language of the statute or in any decision of the New York courts. Even if it did, we cannot perceive how such a relation back could be effective in the face of the intervening freezing of the assets of A.K.M. If the petitioner had no title to those assets on the date when Executive Order No. 8389 became effective, any subsequent judicial act which purported to give him such title would be a transfer of blocked property prohibited by Executive Order No. 8389.

III. The petitioner further contends that the courts below should not have entertained jurisdiction of the action, on the theory that the proceedings below constituted an unwarranted interference with the possession of assets in the custody of the New York receivership court within the rule of such cases as *United States* v. *Bank of New York Co.*, 296 U. S. 463.

The difficulty with this argument is that it assumes that the assets are in the possession or control of the petitioner as receiver. On the contrary, they are held by a third party—ASCAP. The Custodian has sought, as is his unquestioned right, the aid of the federal courts to enforce an order under the Trading with the Enemy Act. Trading with the Enemy Act, Sec. 17, 40 Stat. 411, 50 U.S.C. App. Sec. 17; *Markham* v. *Allen*, 326 U. S.

490. He joined the petitioner only because the petitioner was asserting a claim to the same assets. He has never sought a judgment requiring the petitioner or any other officer of the state court to pay anything over to him, and the judgment here appealed from does not do so.

The position of the Custodian here is even stronger than it was in *Markham* v. *Allen*, *supra*. There the federal courts undertook to determine ultimate rights in a fund actually in the hands of and being administered by a state court. Here the federal courts have determined rights of the Custodian to a fund in the hands of a third party. The suggestion is untenable that because another claimant to that fund happens to be a state receiver the federal courts are deprived of jurisdiction over this federal cause of action. Cf. *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.[7] Accordingly, this question also does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, limited to the question whether the petitioner acquired any title to the debt in suit by his appointment as permanent

[7] Indeed, the state courts have recognized that the federal court is the appropriate forum. Petitioner's independent proceeding in the state courts to require ASCAP to pay the debt over to him has been held in abeyance because those courts held themselves without power to render any decision affecting the Custodian's title to the debt. *Propper* v. *Taylor*, 270 App. Div. 890.

receiver effective September 29, 1941, and in all other respects the petition should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,
DAVID L. BAZELON,
Assistant Attorney General,
JAMES L. MORRISSON,
Attorney.

DECEMBER, 1948.

Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any in-

terest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U.S.C. 1 et seq:

* * * * *

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 5.

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise; and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any

acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

* * * * *

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by

the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transation for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * * *

(j) June 14, 1941—

* * * * *

Austria

* * * * *

SEC. 5.

* * * * *

E. The term "national" shall include,

* * * * *

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country

and/or one or more nationals thereof as herein defined.

* * * * *

General Ruling No. 12, April 21, 1942, 7 F.R. 2991:

(a) Unless licensed or otherwise authorized by the Secretary of the Treasury, (1) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (2) no transfer af the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

* * * * *

(d) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in

a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(e) For the purposes of this general ruling:

(1) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,* That the term

"transfer" shall not be deemed to include transfers by operation of law.

(2) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

* * * * *

By direction of the President.

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No. 390

In the Supreme Court of the United States

OCTOBER TERM, 1948

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, AS RECEIVER OF THE PROPERTY AND ASSETS WITHIN THE STATE OF NEW YORK OF A. K. M., PETITIONER

v.

TOM C. CLARK, ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (II R. 40) is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.

JURISDICTION

The judgment of the Court of Appeals was rendered August 3, 1948 (II R. 47). The peti-

tion for writ of certiorari was filed October 30, 1948, and was granted on January 3, 1949. The jurisdiction of this Court is founded on the provisions of Section 1254 of Title 28 of the United States Code.

QUESTIONS PRESENTED

Petitioner was designated by a New York court as the temporary receiver of the assets of an Austrian national, which assets consist of a debt owed by a third party. The appointment took place two days before the freezing of all transactions in Austrian property by Executive Order. After the date of freezing petitioner was designated permanent receiver. Thereafter the debt was vested by the Alien Property Custodian. Two questions are presented:

(1) Whether, under New York law, title to the debt in suit passed to the petitioner prior to the date of freezing by virtue of his appointment as temporary receiver.

(2) Whether, in the absence of a federal license, title to the debt in suit could pass to the petitioner, after the date of freezing, by his appointment as permanent receiver.[1]

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[1] The writ of certiorari was limited to questions 1 and 2 presented by the petition (II R. 48). Counsel have been advised orally by the Clerk that the Court also desires discussion of the final question presented in the Government's memorandum on the petition (pp. 11-12). The three questions resolve themselves into the two above set forth.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The pertinent provisions of the statutes and Executive Orders involved are set out in the Appendix (pp. 56–80).

STATEMENT

This action was begun on April 22, 1946, in the District Court for the Southern District of New York by the Alien Property Custodian [2] to enforce certain portions of a vesting order (No. 2097, I R. 112–115) by which the Custodian had vested all rights of various named European societies under copyrights for the performance of musical compositions. The complaint (I R. 5), in three counts, alleged that certain royalties were owing by the defendant, American Society of Composers, Authors and Publishers (hereinafter called "ASCAP") to three of the societies named in the vesting order and sought the payment to the Custodian of those royalties. The second count of the complaint (I R. 7–11), the only count involved in this case, claimed the royalties allegedly owing to an Austrian cooperative association, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten and Musikverleger (hereinafter called "A. K. M."). That count named the petitioner as a co-defendant with ASCAP, alleging

[2] Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian, was duly substituted for James E. Markham, Alien Property Custodian (I R. 150). The term "Custodian" will be used herein to refer to the original or the substituted plaintiff as the context may indicate.

that he, as receiver of A. K. M., had made claim to the funds. The complaint prayed that the court adjudge that the Custodian, by virtue of his vesting order, had acquired full title to the debt of ASCAP to A. K. M., to the exclusion of the petitioner, and that the Custodian recover judgment against ASCAP for the royalties claimed (I R. 14–15).

On motions for judgment on the pleadings or for summary judgment, filed by the petitioner (I R. 70) and the Custodian (I R. 92), the District Court entered a judgment declaring that the petitioner has no right, title or interest in the funds which were the subject of the second count (I R. 153). Thereafter, judgment was entered on that count against ASCAP, directing it to pay over to the Custodian the amount of $46,839.54 (II R. 25). On appeal by the petitioner[3] the judgments of the District Court were affirmed unanimously by the Court of Appeals (II R. 40).

The facts relating to the petitioner's claim of title to the indebtedness which was the subject matter of the second count are as follows: On June 12, 1941, on *ex parte* application by a creditor of A. K. M., the Supreme Court for New York County, acting pursuant to Section 977–b of the Civil Practice Act of New York (App. pp.

[3] ASCAP, having stipulated to the entry of the judgment against it, did not appeal. This was the second appeal by petitioner, an earlier appeal having been dismissed as premature, 163 F. 2d 940.

71–80), appointed the petitioner temporary receiver of the assets in New York of A. K. M., directing him to "take, receive and reduce to his possession any and all assets, property, credits and choses in action" of A. K. M. within the State (I R. 49–51). On June 14, 1941, two days after the petitioner's appointment, Executive Order No. 8389 (5 F. R. 1400)—the basic Order authorizing and prescribing freezing controls over foreign funds—had been amended to prohibit transactions involving Austrian property, except as licensed. (Executive Order No. 8785, 6 F. R. 2897, App. pp. 59–61.)[4] No license permitting the petitioner to engage in any transaction involving property of A. K. M. has been applied for or issued (I R. 110).

On September 29, 1941, petitioner was appointed permanent receiver of A. K. M. (I R. 56). He has reduced no assets to possession and has made no distribution to creditors (I R. 95). An action in the New York courts against ASCAP to recover the sums allegedly owed by it to A. K. M. was instituted by him on July 29, 1941 (I R. 96). Its disposition is awaiting outcome of the present proceeding (I R. 133).[5]

[4] The record does not show whether the petitioner qualified as temporary receiver before or after the date of freezing (I R. 32, 50, 52–55, 76). See *infra*, fn. 34, p. 44.

[5] For opinions of the New York courts relating to the petitioner's action against ASCAP, see I R. 117–123, 133–136; *Propper* v. *Buck*, N. Y. Law Journal, October 29, 1941, p.

SUMMARY OF ARGUMENT

Neither petitioner's appointment as temporary receiver of the assets of A. K. M. (prior to the freezing, by Executive Order, of those assets) nor the petitioner's appointment as permanent receiver (after freezing) passed to him any title to the funds in suit. The first appointment, as temporary receiver, passed no title by the provisions of the New York statute. The second appointment, as permanent receiver, passed no title because there had already intervened the application of federal freezing controls which forbade transfers involving the property of A. K. M., an Austrian national. A. K. M. thus retained title to its assets until the date of the Custodian's Vesting Order; by virtue of that Order all right and title passed to the Custodian.

1. While under the New York statute involved, a permanent receiver ordinarily takes title to the corporate assets, in this case there intervened the federal freezing regulations. Executive Order No. 8389 became effective with respect to Austrian property on June 14, 1941. The Executive Order explicitly prohibits, *inter alia*, all un-

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1268, col. 5; *Propper* v. *Buck*, 32 N. Y. S. 2d 103 (1st Dept.); *Propper* v. *Buck*, 178 Misc. 76, 33 N. Y. S. 2d 11 (Sup. Ct. N. Y. Co.), affirmed, 263 App. Div. 948, 34 N. Y. S. 2d 134; *Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. S. 2d 829 (Sup. Ct. N. Y. Co.), affirmed, 270 App. Div. 890, 62 N. Y. S. 2d 602 (1st Dept.); *Propper* v. *Taylor*, 186 Misc. 72, 58 N. Y. S. 2d 831 (Sup. Ct. N. Y. Co.), modified, 270 App. Div. 890, 62 N. Y. S. 2d 601 (1st Dept.).

licensed "transfers * * * of, or dealings in * * * any evidences of indebtedness or evidences of ownership of property" of Austrians. No license has been issued for a transfer to the petitioner. It follows that a transfer of title by the state court's order appointing petitioner permanent receiver was prohibited by Executive Order No. 8389. The state court did not purport to override the Executive Order; had it done so, its decision could not be given effect.

Explicit confirmation of the effect of the Executive Order is found in General Ruling No. 12 of the Treasury Department, which is a construction of the Executive Order and can also be viewed as a regulation having independent force. The Ruling declares null and void any unlicensed transfers of property in violation of the Executive Order. It specifically covers transfers by judicial process or order of property such as A. K. M.'s claim against ASCAP. It is therefore evident that under Executive Order No. 8389 and General Ruling No. 12 the petitioner could not acquire any interest in the claim on or after June 14, 1941, in the absence of a federal license. A contrary conclusion—construing the Order and Ruling to permit unlicensed transfers of title—would defeat the purpose of the Government's detailed program for the regulation of foreign funds during the war and the preceding period of declared national emergency. And it would permit those who cooperated with Axis loot-

ers to flout the Order now to realize upon their ventures.

2. The petitioner's appointment as temporary receiver of A. K. M. did not, under the New York statute, invest him with title to A. K. M.'s assets. The two lower courts, composed of judges of long experience in New York law, so held, and their decision should stand.

In any event, the decision below is correct. In New York, as elsewhere, temporary receivers do not have title to the corporate assets, either in equity or in statutory proceedings, and nothing in the governing statute indicates that a different rule is intended to apply. Indeed, the section contains affirmative evidence that only a permanent receiver is to have title. The plan of the statute and the sequence of its paragraphs make it clear that Subdivision 4, which specifies the duties of the temporary receiver, is designed to be exclusive. That subdivision limits those duties to the holding and preserving of the corporate assets. The provision of Subdivision 19 that "the receiver" shall have title to the corporate assets, read in its context, is a reference to the permanent receiver only. The contrary conclusion could have the anomalous result that by an *ex parte* proceeding, in which the appointment of a temporary receiver is mandatory and there is no judicial determination of the need for such a receiver, the corporation could be deprived of title to its assets.

ARGUMENT

The facts are simple: Under a New York statute for the liquidation of the local assets of dissolved or dormant foreign corporations, the petitioner was on June 12, 1941, appointed temporary receiver of the New York assets of A. K. M., an Austrian national. On September 29, 1941, he was appointed permanent receiver. Between these two dates there intervened the application of federal freezing controls to the property of Austrian nationals, under which transactions involving A. K. M.'s property were prohibited except as licensed. No license was issued. In 1943 the Custodian vested the only asset of A. K. M.—a claim against ASCAP. The petitioner's asserted interest in this claim is rested upon his successive appointments as temporary and permanent receiver.

The Government contends, as the courts below held, that neither of these appointments, nor any other acts in the course of the New York court proceeding, passed any title to the petitioner, and, therefore, that the 1943 Vesting Order gave full and good title to the Custodian. Specifically, we contend that the petitioner could not, under federal law, have acquired title to the claim after June 14, 1941, when freezing controls were applied to A. K. M.'s property. And the petitioner did not, under New York law, acquire title before the date of freezing.

I

EXECUTIVE ORDER NO. 8389 PROHIBITED ANY TRANSFER, ON OR AFTER JUNE 14, 1941, OF TITLE OR INTEREST IN THE DEBT IN SUIT, WHETHER BY PRIVATE OR JUDICIAL ACTION

The petitioner contends (Brief, pp. 33–53) that by his appointment as permanent receiver on September 29, 1941, he acquired title to the claim of A. K. M. against ASCAP. The contention, and any contention based on acts occurring on or after June 14, 1941, must fail, we believe, because on that date there intervened the application of federal freezing controls to the property of A. K. M. as an Austrian national. Although the issues are thus narrowly framed, they raise a question basic to the entire federal program for the regulation of foreign funds adopted after the outbreak of the war in Europe. To place this question in its proper context, it is necessary to set out the origins of the program.

A. THE BACKGROUND AND LEGISLATIVE BASIS OF THE FREEZING OF AUSTRIAN PROPERTY

The system of freezing controls rests upon Section 5 (b) of the Trading with the Enemy Act, as amended by the Joint Resolution of May 7, 1940, 54 Stat. 179 (App., pp. 56–57), and as further amended by Section 301 of the First War Powers Act, 1941, 55 Stat. 839, 50 U. S. C. App. 5 (b) (App., pp. 56–58).

The application of freezing controls to Austria and other countries on June 14, 1941, was the

culmination of a program instituted more than a year earlier. Executive Order No. 8389 of April 10, 1940, issued pursuant to Section 5 (b) of the Trading with the Enemy Act, prohibited transactions involving property of Norway or Denmark or their nationals, except as licensed under regulations simultaneously issued (40 Stat. 411, 415, as amended, 48 Stat. 1, 5 F. R. 1400, 1401). The Order followed by two days the German invasion of the two countries involved. As was plain, its primary purpose was to prevent any benefit to the invaders by means of transfers of the property of those countries and their nationals.[6] The following month, the Order and the regulations were explicitly ratified by the Congress in the Joint Resolution of May 7, 1940, 54 Stat. 179, Appendix, p. 57. That Resolution also amended Section 5 (b) of the Act to authorize the President to

> investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in,

[6] The purpose of the Order and its amendments, and the legislative history of the statute involved, are discussed below, pp. 30–37.

> any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; * * *

The country by country extension of freezing controls, in the years 1940 and 1941, kept pace with the extension of aggression in Europe:

May 10, 1940, The Netherlands, Belgium and Luxembourg,[7]

June 17, 1940, France,[8]

July 15, 1940, Latvia, Esthonia and Lithuania,[9]

October 10, 1940, Rumania,[10]

March 4, 1941, Bulgaria,[11]

March 13, 1941, Hungary,[12]

March 24, 1941, Yugoslavia,[13]

April 28, 1941, Greece.[14]

Finally, on June 14, 1941, "by virtue of the existence of a period of unlimited national emergency," declared on May 27, 1941, the President extended the controls of Executive Order No. 8389 to all of continental Europe. Proclamation 2487, 6 F. R. 2617; Executive Order No. 8389, as amended

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[7] Executive Order No. 8405, 5 F. R. 1677.
[8] Executive Order No. 8446, 5 F. R. 2279.
[9] Executive Order No. 8484, 5 F. R. 2586.
[10] Executive Order No. 8565, 5 F. R. 4062.
[11] Executive Order No. 8701, 6 F. R. 1285.
[12] Executive Order No. 8711, 6 F. R. 1443.
[13] Executive Order No. 8721, 6 F. R. 1622.
[14] Executive Order No. 8746, 6 F. R. 2187.

by Executive Order No. 8785, 6 F. R. 2897, Appendix, pp. 59–61.[15] The Government announced that the Executive Order "is designed, among other things, to prevent the use of the financial facilities of the United States in ways harmful to national defense and other American interests, to prevent the liquidation in the United States of assets looted by duress or conquest, and to curb subversive activities in the United States." Press Release No. 1, June 14, 1941, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control* (1946), p. 64.

Immediately upon the entry of the United States into the war, the Congress, in the First War Powers Act, 1941, further amended Section 5 (b) of the Trading with the Enemy Act to broaden the President's powers over foreign property, and to confer explicitly the powers to "nullify, void, prevent or prohibit" any transfers of or dealings in property in which a foreign country or national thereof had an interest (Sec. 301, First War Powers Act, 1941, 55 Stat. 839, App., pp. 57–58). *Clark* v. *Allen*, 331 U. S. 503, 512. The Congress also expressly approved, ratified and confirmed all prior actions taken by the President or the Secretary of the Treasury under the Trading with the Enemy Act which would have been authorized had the provisions of the First War Powers Act

[15] Subsequent extensions of the Order to the countries of the Far East are not here involved.

been in effect (Sec. 302, First War Powers Act, 1941, 55 Stat. 840, App., p. 58).[16]

B. EXECUTIVE ORDER NO. 8389, AS AMENDED JUNE 14, 1941, FORBADE TRANSFERS, WHETHER PRIVATE OR JUDICIAL, OF THE DEBT IN SUIT

Executive Order No. 8389, as amended on June 14, 1941 (App., pp. 59–61) prohibits certain transactions, except as licensed, in the property of nationals of various countries, including Austria. The petitioner does not deny that A. K. M. is an Austrian national,[17] whose property is subject to the Order, and that no license for transactions in its property has ever been issued to him (I R. 110–111). He contends, in substance, that the

[16] The general constitutionality of the Government's program for the regulation of foreign property in time of threatened or actual war is no longer open to doubt, and is not challenged by petitioner. See *e. g.*, *Silesian-American Corp.* v. *Clark*, 332 U. S. 469; *United States* v. *Von Clemm*, 136 F. 2d 968 (C. A. 2), certiorari denied, 320 U. S. 769; *Commission for Polish Relief, Ltd.* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345; *Alexewicz* v. *General Aniline & Film Corp.*, 181 Misc. 181, 43 N. Y. S. 2d 713 (Sup. Ct. Broome Co.).

[17] In Section 3, Austria is named as a "foreign country designated in this Order," and the Order is made effective as to Austria and its nationals on and after June 14, 1941. In Section 5E (ii) the term "national" is defined as including "any partnership, association, corporation or other organization, organized under the laws of * * * such foreign country." Since A. K. M. is admitted to be a "cooperative society * * * organized and existing * * * under the laws of * * * Austria" (I R. 8, 29), there can be no question that it is a "national" of a "foreign country designated in this Order," and that, therefore, its property is subject to the Order.

Executive Order does not prohibit transfers of title by judicial process, or, more specifically, a transfer of title to him, under New York law, by his appointment as permanent receiver on September 29, 1941. The Executive Order reads in part as follows:

> SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if * * * such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:
>
> A. All transfers of credit between any banking institutions within the United States * * *;
>
> B. All payments by or to any banking institution within the United States;
>
> C. All transactions in foreign exchange by any person within the United States;
>
> D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;
>
> E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

> F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

It is clear that by virtue of this section, on and after June 14, 1941, ASCAP could neither pay its debt to A. K. M. nor make payment to the petitioner as A. K. M.'s receiver. Such a payment would be a "payment by * * * [a] banking institution" within the meaning of Section 1, paragraph B of the Order. For ASCAP is comprehended by the definition of "banking institution" in Section 5F of the Order, which includes "any person holding credits for others as a direct or incidental part of his business" (App., p. 61). See Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems 17, 34 (1945).

The petitioner all but concedes that payment by ASCAP is prohibited; but he apparently would argue that only payment, and not transfer of title, is prohibited (Brief, pp. 43, 47). The force of the Executive Order is, however, not limited to the prohibition of *payments* contained in Section 1, paragraph B. The remaining paragraphs clearly establish that the Order is directed against transfers of ownership or of any lesser interests. Thus, the prohibition, by paragraph A, of "transfers of credit" is plainly a prohibition of the unlicensed creation of a new debtor-creditor relationship. Paragraph E even more broadly prohibits all "transfers * * *

or dealings in * * * any evidences of indebtedness or evidences of ownership of property."

A transfer to the petitioner of title or interest in ASCAP's debt to A. K. M. would thus be prohibited under paragraph A, as a "transfer[s] of credit between any banking institutions within the United States," since the petitioner, who as a receiver holds credits for others, is within the definition of "banking institution" in Section 5F of the Order. A transfer to the petitioner would, moreover, necessarily entail the making either of some formal acknowledgment by ASCAP, of a formal assignment, or of appropriate entries on ASCAP's books and on the petitioner's records. Such an act, or, indeed, any act purporting to effect the transfer, would be prohibited under paragraph E of Section 1 as a "transfer[s] * * * of, or dealing[s] in any evidences of indebtedness or evidences of ownership of property." It is obvious that the intent of the framers of this language was to bring within the scope of the Order *every* transaction affecting property in which foreign nationals had an interest.[18]

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[18] The words "dealing in" are, of course, most comprehensive. The phrase "evidence of indebtedness" has generally been held to mean any legal evidence effective to establish the existence of indebtedness, and is sufficient to include mere book entries. *Commonwealth* v. *Imperial Woolen Co.*, 290 Pa. 526, 139 A. 199; see also *Bruner* v. *State*, 26 Okla. Crim. 448, 224 P. 555; *Schalucky* v. *Field*, 124 Ill. 617, 16 N. E. 904.

The order of the New York Supreme Court appointing the petitioner permanent receiver would itself be an evidence of

The petitioner's major argument against the application of the Executive Order rests on the fact that the purported transfer to him of A. K. M.'s rights was by judicial process.[19] The question is, therefore, whether a transfer in the course

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indebtedness or, if effective to create rights in petitioner, it would constitute an evidence that ASCAP's indebtedness to A. K. M. has been transferred to the petitioner.

The entire phrase "evidences of indebtedness or evidences of ownership of property" appears, first, in the history of freezing controls in the Joint Resolution of May 7, 1940 (App., pp. 56–57). The debates, to the extent the question was touched upon, show an emphasis on the words "evidences of ownership of property," indicating its comprehensive character. Thus, Senator Wagner said (86 Cong. Rec. 5176):

"I think everybody knows what 'evidence of property' [sic] is. It is evidence one has that he owns certain property. If a person has common stock or a deed, he owns an interest in a certain enterprise or certain property. That is what the 'evidence of ownership' [sic] means."

The breadth of the intended understanding of the single word "property" is of cumulative relevance to the sweep of the entire phrase. The Treasury Department, in the regulations issued April 10, 1940, under Executive Order No. 8389, had comprehensively defined "property" as including, *inter alia*, "money * * * any debts, indebtedness or obligations * * * bills of sale, other evidences of title or ownership * * * accounts payable, judgments * * * etc." (5 F. R. 1401, App., pp. 69–70). Compare the substantially identical definition in the amended regulations, issued June 14, 1941 (6 F. R. 2905) (App., pp. 70–75).

[19] In so far as this argument rests on the notion that the receivership court had custody or *in rem* jurisdiction of the debt, and that there has been federal interference with such *in rem* jurisdiction, see the discussion below, pp. 48–50, 53–55.

of judicial action is any less prohibited by the Executive Order than a voluntary transfer, whether a payment or other type of consensual transfer, between individuals. There is, we submit, no basis for such a distinction either in the words or plain purport of the Executive Order. As the court below stated (II.R. 45):

> The language of Exec. Order 8389 prohibits the unlicensed transfer of an enemy alien's property.[20] There is no cogent reason for excepting transfers by judicial process. To allow the exception would be to furnish a means of evasion by which the impact of freezing controls could be avoided by recourse to judicial proceedings.

The possible evasion by recourse to judicial proceedings is only too plain. A transfer between A and B, prohibited when voluntary, could become effective if A sued B and B defaulted.[21] The purposes to be achieved by the system of freezing controls (*infra*, pp. 30–32) required that a federal executive agency have control and supervision over every transfer and transaction, whether voluntary or judicially created. It was for this reason that the enforcement of freezing

[20] While the court speaks only of the property of enemy aliens, the prohibition of the freezing order extended to the property of a number of neutral and friendly countries as well.

[21] The New York Supreme Court judgment appointing petitioner permanent receiver was entered by default. A. K. M. was served by publication and made no appearance (I.R. 56).

control policies was placed in the Treasury, and not left in the hands of private parties engaging in voluntary transactions or in the hands of the various state and federal courts. The courts were not entrusted with the fulfillment of these policies; they could not be expected to mold their judgments in accordance with the national interest in the freezing, and exemption from freezing, of foreign funds. The Treasury Department alone had that function, and if transfers resulting from judicial proceedings were exempted from its area of control, a large and significant gap would exist in the freezing system. Accordingly, the Executive Order unqualifiedly "prohibited" all transfers and dealings involving the property frozen, unless they were licensed, and made no exception, explicit or implicit, for transfers stemming from judicial action.

A federal court would be as powerless as a state court to effect a transfer in violation of the Order. Whatever interference with state law and procedure, however, which was occasioned by the adoption of this over-all federal order was no greater, and no less valid, than that resulting from the wartime establishment of overriding federal rent and price controls, manpower requirements, credit restrictions; or stabilization measures (cf. *Testa* v. *Katt*, 330 U. S. 386), or from the adoption of federal policies in the conduct of foreign relations (cf. *United States* v. *Pink*, 315 U. S. 203; *Steingut* v. *Guaranty Trust Co.*, 58 F. Supp. 623, 633-635 (S. D. N. Y.), affirmed, 161 F. 2d. 571 (C. A.

2)).[22] The fulfillment of the Federal Government's functions, particularly in time of war, frequently compels the restriction or modification of preexisting state law or practice, and there is no doubt that this can constitutionally be done. Plainly, if a transfer or transaction is "prohibited" by a valid federal statute or Executive Order, it cannot be enforced or independently accomplished by any court, state or federal. If the order of the New York court had purported to transfer title in violation of the freezing regulations, its judgment could not be given effect. "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Kalb* v. *Feuerstein*, 308 U. S. 433, 439. See also *Gross* v. *Irving Trust Co.*, 289 U. S. 342; *Taylor* v. *Sternberg*, 293 U. S. 470; *Matter of Rosenberg*, 269 N. Y. 247, 199 N. E. 206. See generally, Boskey and Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 Col. L. Rev. 1006, 1016–1030 (1940).

Exercising the powers conferred by Section 5 (b) of the Trading With the Enemy Act, the President has prohibited transactions which purport, without a license, to transfer title to frozen

[22] The *Steingut* case held that certain provisions of Section 977-b of the New York Civil Practice Act—the New York statute involved here—must yield to contrary federal policies embodied in the recognition of the Soviet Union and the Litvinov Assignment.

property. We can perceive no reason for saying that the interest of the United States in controlling all transfers of foreign property during a time of national emergency is any less entitled to prevail over a conflicting judgment of a state court, or a contrary state receivership procedure, than was its interest in protecting bankrupt farmers, involved in *Kalb* v. *Feuerstein, supra*, in enforcing federal price control legislation (*Testa* v. *Katt, supra*), or in carrying on its foreign relations (*United States* v. *Pink, supra*).

Although the lack of power of the state court to act contrary to the Executive Order would seem to be determinative of the issue, if there were a conflict, it should be pointed out that the order appointing the petitioner permanent receiver (I R. 56) did not purport to pass to him title to any debt or asset which could not be lawfully passed, under federal freezing regulations or other applicable law. In a word, under the order the petitioner took only such title as A. K. M. could properly pass under law. The question of the effect of the Executive Order was not litigated in the state court proceeding, and, indeed, the United States was not a party to that proceeding. Cf. *United States* v. *United States Fidelity and Guaranty Company*, 309 U. S. 506. In the absence of the most explicit language to the contrary, the order appointing the petitioner should be construed as being in conformity with the federal Executive Order, which under the supremacy clause of the

Constitution (Art. VI, Cl. 2) formed part of the law of New York.

The petitioner's contention that his appointment as permanent receiver after the date of Executive Order No. 8389 "related back to the commencement" of the state court proceeding (Brief, p. 33) must fall with the main contention with respect to the Executive Order itself. If the petitioner had no title when the Executive Order became effective on June 14, 1941, any subsequent act, judicial or otherwise, which purported to give him such title would be a transfer prohibited or nullified by the Executive Order.[23] There is, moreover, no support for a "relation back" argument in the New York law. In that jurisdiction, it is held, in conformity with general principles of equity, that the rights of a receiver do not relate back where there have been intervening rights. *Moran* v. *Sturges*, 154 U. S. 256 (dealing with New York law); *Herring* v. *N. Y., L. E. &*

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[23] Compare the provisions of paragraph 2 of General Ruling No. 12 of the Treasury Department, (App., p. 63):

"Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order."

On General Ruling No. 12, see *infra*, pp. 24–30. On the meaning of "blocked account," see fn. 24 *infra*, pp. 24–25.

W. R. R. Co., 105 N. Y. 340, 377–8, 12 N. E. 763, 776–7.

C. AS ADMINISTRATIVELY CONSTRUED, THE ORDER FORBIDS TRANSFERS BY JUDICIAL PROCESS.

The text of the Order itself compels the conclusion that transfers of interests after June 14, 1941, are prohibited, and that a prohibited transfer has no greater effect where it purports to have been accomplished by judicial process. If any doubt remained it would be readily resolved by the provisions of General Ruling No. 12 of the Treasury Department, issued April 21, 1942, 7 F. R. 2991 (App., pp. 62–66). That Ruling provies that—

> (1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389] is null and void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; * * *[24]

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[24] There is no question that ASCAP's debt to A. K. M. was "property in a blocked account." Paragraph 5 (b) of the Ruling defines "property" as including "credit," "debts," and "claims." "Blocked account" is defined by paragraph 5 (c) as an "account in which any blocked country [i. e., a foreign country designated in the Executive Order] or national thereof has an interest, with respect to which account payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to a license authorizing such action" (Para. 5 (c), General Ruling No. 12, App., p. 65, incorporates by reference definitions of "blocked account" and "blocked country" in General Ruling No. 4, paras. 8, 4, App., p. 62). This definition of "blocked account" is

Paragraph 5 (a) of the Ruling defines "transfer" as including "any actual or purported act or transaction * * * the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property," and then goes on specifically to include in the class of transfers affected by the Order:

> the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment.

Words could not more explicitly state that what was prohibited was a result—the creation or transfer of any interests in the blocked property—and that the accomplishment of that result by any form of judicial action, including, as here, the entry of judgment appointing a receiver, was un-

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applicable here, for, as we have pointed out (pp. 15–16, *supra*), payment by ASCAP out of its account with A. K. M. is prohibited by the Executive Order unless licensed.

Paragraph 5 (c) of General Ruling No. 12 excludes from the definition of "blocked account" one which was "not treated as a blocked account by the person with whom such account is held or maintained." This exclusion is inapplicable here, for ASCAP has consistently treated A. K. M.'s account as blocked (I R. 99–100, 124). Hence, the claimed debt of ASCAP to A. K. M. was undoubtedly "property" and "in a blocked account" within the meaning of General Ruling No. 12, *supra*.

qualifiedly prohibited and was to have no effect, that is, was to be "null and void."

The issuance of General Ruling No. 12 was an exercise of the powers conferred on the Secretary of the Treasury by Section 7 of Executive Order No. 8389 (App., p. 61) to prescribe "regulations, rulings, and instructions to carry out the purposes of this Order." It was designed to be declaratory of the scope of Executive Order No. 8389; in issuing it, the Secretary stated that "unlicensed transfers of blocked assets always have been void and unenforceable under the freezing orders and * * * today's ruling serves the purpose of emphasizing this fact for the benefit of any of the public who may have overlooked this aspect of freezing control." Press Release No. 34, April 21, 1942, U. S. Treasury Department, Documents Pertaining to Foreign Funds Control (1946), pp. 71–72.[25]

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[25] The Court of Appeals approved the General Ruling and the explanatory statement of the Treasury Department as a correct interpretation of the Executive Order (II R. 44–45). If the Ruling were not to be regarded as a permissible interpretation of the Executive Order, it could nevertheless have force as an independent regulation deriving its statutory support from the amendment of Section 5 (b), on December 18, 1941, by the First War Powers Act, 1941 (App., pp. 57–58). By that amendment, the Congress conferred upon the President the enlarged powers to "regulate, * * * nullify, void, prevent or prohibit, * * * any acquisition holding * * * transfer * * * of, or dealing in * * * or transactions involving, any property in which any foreign country or a national thereof has any interest." General ruling No. 12 recites that it was issued "by direction of

Accordingly, we submit that the Ruling is entitled to great weight as a construction of the scope of the Executive Order by the agency administering the provisions of the Order and expert in its meaning. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 139–140; *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 471.[26]

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the President." Moreover, full authority under the amended Section 5 (b) had been delegated to the Secretary of the Treasury. Section 2, Executive Order No. 9095, March 11, 1942, 7 F. R. 1971, and the letter of the same date from the Alien Property Custodian to the Secretary of the Treasury, 7 F. R. 2115. See *United States* v. *Leiner* 143 F. 2d 298, 299 (C. A. 2, 1944). Compare Executive Order No. 9193, July 6, 1942, 7 F. R. 5205, Secs. 3, 12. The Ruling may, therefore, be regarded as an independent, retroactive nullification of transactions intended to be prohibited by the Executive Order, such as, in this case, the vesting of title to A. K. M.'s asset in the petitioner by his appointment as permanent receiver on September 29, 1941.

We submit that there can be no doubt of the constitutional power, in time of war, thus to "nullify" transactions which took place after the effective date of the Executive Order where, as here, the transaction was within the plain intendment of that Order, even though it may be thought not explicitly prohibited by the Order's terms. Cf. *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38; *Milliken* v. *United States*, 283 U. S. 15, 23; *Illinois Central R. R. Co.* v. *Minnesota*, 309 U. S. 157, 164–5; *Lichter* v. *United States*, 334 U. S. 742, 799–9; *Fleming* v. *Rhodes*, 331 U. S. 100.

[26] From the inception of freezing controls on April 10, 1940, until September 30, 1948, the administration of freezing controls, including the authority to issue licenses, was in the Secretary of the Treasury (5 F. R. 1400). Effective on the latter date, the authority was transferred to the Attorney General in so far as it related to property then blocked (Executive Order No. 9989, Aug. 20, 1948, 13 F. R. 4891). Prior

The petitioner has apparently abandoned the contention, rejected below (II R. 44–45), that a transfer to him was nevertheless permitted by paragraph 4 of the General Ruling (App., pp. 63–64). He makes the same argument in substance, however, by his reliance on certain statements in Government briefs and stipulations in other cases (Brief, pp. 50–53). Those statements, based on the principles of Paragraph 4 of the Ruling, are to the effect that there is no inconsistency between the Executive Order and the exercise of jurisdiction by a state court by means of an attachment which would create no lien or rights in the property. This has been the oft-stated position of the Treasury, dictated by a desire not to "forbid" or interfere with the bringing of litigation in the courts. Thus, Paragraph (4) of General Ruling No. 12 provides that transfers by judicial action shall be determinative of the rights of the parties to the judicial proceedings, with the explicitly stated proviso that the judicial process shall not create "a greater right * * * than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate

to this transfer, the Secretary of the Treasury had, upon the vesting of property by the Alien Property Custodian or the Attorney General as his successor, released to the Custodian or the Attorney General all authority under the Trading with the Enemy Act with respect to the property so vested. See Sec. 2, Executive Order No. 9193, July 6, 1942, 7 F. R. 5205; *Cf.* General Ruling No. 19, issued by the Treasury Department, as amended August 2, 1946, 10 F. R. 14775, 11 F. R. 8350.

license." A purported voluntary assignment by either A. K. M. or ASCAP to the petitioner, on or after June 14, 1941, would plainly have been ineffective, in the absence of a Treasury license, to give the petitioner any interest in the property. Consequently, the judicial appointment of the petitioner as receiver was equally ineffective.

The narrow purpose of Paragraph 4 of the Ruling—to permit litigation without allowing the unlicensed creation or transfer of any interests in blocked property by judicial process—has been repeatedly stated by the Government and widely understood by the bar. See Press Release No. 34, April 21, 1942, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control* (1946), pp. 71, 73;[27] Public Circular No. 31, August 2, 1946, 11 F. R. 8351, App., pp. 67–68; letter by Randolph E. Paul, General Counsel of the Treasury Department, published in *American Banker,* December 11, 1942, p. 3,

[27] "Paragraph (4) is but a formal statement of the position which the Treasury Department has always taken on litigation (including attachments) affecting blocked assets. The Treasury has no desire to limit the bringing of suits in courts within the United States: *Provided*, That no greater interest is created by virtue of the attachment, judgment, etc., than the owner of the blocked account could have voluntarily conferred without a license. Thus, the Treasury does not want to interfere with the orderly consideration of cases by the courts provided that the results of court proceedings are subject to the same policy consideration from the point of view of freezing control as those arising through voluntary action of the parties."

col. 2; Berger and Bittker, *Freezing Controls: The Effects of an Unlicensed Transaction*, 47 Col. L. Rev. 398 (1947); Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 Law and Contemp. Problems, 17, 44–49 (1945); and Reeves, *Policies of the United States Treasury as Applied to Blocked Funds in Litigation*, 113 N. Y. L. J. 2180, 2200 (1945).

D. TO CONSTRUE THE FREEZING REGULATIONS AS PERMITTING AN UNLICENSED TRANSFER OF AN INTEREST IN BLOCKED PROPERTY, AND AS MERELY PROHIBITING PAYMENT, WOULD DEFEAT THE PURPOSE OF FREEZING CONTROLS

As already noted, the freezing program was instituted in April of 1940 primarily for the protection of the property in the United States of nationals of countries overrun by the Axis. It continued after our entry into the war as one of the major weapons of the United States in waging economic warfare against the Axis. See U. S. Treasury Dept., *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 1–4.

The petitioner misplaces his reliance (Brief pp. 43–47) on the legislative history of the amendment to Section 5 (b) of the Act contained in the Joint Resolution of May 7, 1940 (App., pp. 56–57), as showing an intention not to prohibit all unlicensed transfers. The Committee reports shed little light on the question now in issue. See S. Rep. No. 1496, 76th Cong., 3d Sess.; H. Rep. No. 2009, 76th Cong., 3d Sess.

During the relatively brief debates, while individual Senators[28] adverted to the most pressing instance of the transfers to be prohibited—those coerced by the Germans—there was full appreciation that transfers generally would be prohibited, except as licensed, and that control would be exercised by the prevention of changes in title, and not merely prevention of payment. Thus, Senator Connally stated (86 Cong. Rec. 5179):

> *The matter involved is the title and ownership to the property affected.* Whether it be a stock certificate, or a check, or a piece of money, it is all property. *The object is to give the Government some power of regulation and control over the transfer of ownership.* [Italics supplied.]

The following colloquy between Senator Connally and Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out the Resolution, indicates the understanding that not merely payment, but *any* changes of title were to be prohibited (86 Cong. Rec. 5007):

> *Mr. Connally.* And is not this measure for the purpose of *preventing change of title* of the property here in the United States by conquest, or by any other forcible or violent means?

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[28] There were apparently no debates in the House. See 86 Cong. Rec. 5335–6; 5468, 5519. The debates in the Senate are found at 86 Cong. Rec. 5006–5, 5103, 5168–5184.

> *Mr. Wagner.* That is exactly the purpose. [Italics supplied.]

Senator Danaher, moreover, called attention to the broad scope of the Treasury definition of "property," transfers of which were to be regulated by the Treasury under the Executive Order (86 Cong. Rec. 5177). And Senator Wagner's comments indicated, as was the case under the Order, that transactions would be generally prohibited and then permitted under license (86 Cong. Rec. 5007):

> Under the proposed law the United States Government would inquire into the reason for the transfer, the circumstances under which it was asked. If we found that it was the result of duress, we would refuse to grant a license. It is a protective measure.

The petitioner relies on Senator Wagner's later remarks to the effect that the Joint Resolution "does not absolutely prohibit" the transfers or the transactions (86 Cong. Rec. 5175, 5176). It is clear from the context that the Senator meant simply that the Joint Resolution contemplated a prohibition in the first instance, and, thereafter, the issuance of a license in appoved cases. He did not mean, or say, that the Order or the resolution banned only payments, or were otherwise restricted in their coverage. Moreover, the text of the Joint Resolution is clear; the President was authorized to "investigate, regulate, or

prohibit" transactions described substantially in the words of Executive Order No. 8389, as it was issued April 10, 1940, and as it was amended on June 14, 1941 (App. pp. 56–57, 59–60). And by Section 2 of the Joint Resolution, Congress explicitly ratified the 1940 Executive Order, and the regulations issued thereunder (App., p. 57).

The legislative understanding of the scope of the freezing controls was reflected in perhaps a more comprehensive manner in the committee reports on the First War Powers Act, 1941, which ratified the 1941 amendments to the Executive Order and further amended Section 5 (b) of the Act (App. pp. 57–58). The House Committee on the Judiciary stated (H. Rep. 1507, 77th Cong., 1st Sess., p. 3):

> At present the Government exercises supervision over transactions in foreign property, either by prohibiting such transactions or by permitting them on condition and under license. It is, therefore, a system which can prevent transactions in foreign property prejudicial to the best interest of the United States, * * *

Like statements were made by the Senate Committee. See S. Rep. 911, 77th Cong., 1st Sess., p. 2.

These legislative materials, we submit, clearly reflect the Congressional intention to prevent all changes of ownership of foreign property, except as licensed. Powers thus broad were necessary

to the achievement of the objectives of the freezing program. See U. S. Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government (1942)*, pp. 1–4, and *passim;* Press Releases No. 1, June 14, 1941 and No. 34, April 21, 1942, U. S. Treasury Department, *Documents Pertaining to Foreign Funds Control (1946)*, pp. 64, 71, 72. That this is so may be shown by a few illustrations.

1. One of the primary objectives of freezing control was to protect the property of persons in countries overrun by the Axis from the various forms of looting in which the Axis notoriously engaged. If a coerced transfer of property could be effective to transfer title, and the freezing regulations merely prevented payment or delivery to the transferee, the transfer would effectively deprive the former owner of all interest in the property. The transfer being valid, the transferee would be the owner and the bank or other holder of the property could not respect any directions of the transferor with respect to it. A freezing program which merely prevented payment would thus be ineffective against Axis looting.

2. An even more important objective, especially after the outbreak of the war, was that of preventing the Axis from using property in the United States as a means of obtaining credit and foreign exchange to support its war effort. A freezing program which permitted transfers of

title to securities, bank accounts, and other assets in the United States, would have been inadequate to prevent the enemy from benefiting from those assets. The Axis could acquire dollar assets with no greater effort than the pointing of a gun or the exaction of "occupation costs." Having thus acquired title to blocked dollar assets, the Axis could readily have sold them at a discount to neutral speculators in order to obtain currencies of neutral countries. Those currencies would have paid for deliveries of needed commodities; they would also have financed espionage, sabotage, and propaganda. If such a sale passed good title, the purchaser would be assured that no one else could be recognized as the owner of the property, and would have a substantial expectation of being able to realize on the property upon the eventual relaxation of the freezing controls. Under those circumstances, trading in blocked dollar assets at an appropriate discount might well be an attractive venture. If, on the other hand, the purchaser got no title but only the possibility of acquiring title if he could obtain a license, the attractiveness of such trading in blocked accounts would be very greatly diminished.

The greatest success of the freezing controls was that transfers of this sort were discouraged through fears of their efficacy. If this Court should now hold that unlicensed transfers may carry title, those who in cooperation with the Axis gambled by speculating in blocked assets would

be rewarded by securing good title to those assets. And if such speculators were thus allowed to profit in this war, the *in terrorem* effect of any similar controls that might be required in the future would be lessened.

3. The freezing controls, by preventing unlicensed transfers of foreign property, also made it more difficult for enemy property to escape the vesting program. Much actual enemy property was ostensibly owned by neutrals. If those neutrals had been free to transfer ostensible ownership of the property before it could be vested, they might before the war have rendered it impossible to trace it back to its original enemy ownership. A decision that an unlicensed transfer passes title to such property would greatly increase the chance of success of such attempts of actual enemies to conceal their property.

The foregoing illustrations sufficiently indicate, we believe, that a holding that frozen foreign property may be transferred without the license of the Treasury Department would seriously impair the effectiveness of the national program of freezing controls. It is equally clear, as was pointed out by the court below, that the prohibition must extend to judicial as well as voluntary transfers. The purpose of Congress was to place *all* transfers of foreign property under federal supervision. To permit parties to escape that supervision by the use of judicial process would furnish an easy means of evasion through

the entry of judgments by consent or default. Even in the absence of any purpose of evasion, to permit rights to be acquired as a result of judicial action without any supervision on the part of the federal agencies charged with administering the freezing program, would render impossible any consistent and centralized administration of that program. *Supra* pp. 19–20.[29]

E. THE JUDICIAL CONSTRUCTION OF THE ORDER

The conclusion reached by the Court of Appeals, and reaffirmed by that court in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, No. 141, October Term, 1948, February 21, 1949, slip opinion, pp. 839–40, is in accordance with the decisions of the other federal courts which have had occasion to consider the problem. Without exception, those courts have disregarded rights claimed to have been acquired by unlicensed judicial action such as the levy of attachments, and

[29] The petitioner contends that the receiver's administration of A. K. M.'s assets, including the debt in suit, will serve the interests of A. K. M.'s creditors better than would the system of freezing controls. But freezing controls do not, and have not, involved any disposition of the blocked assets; as the popular name connotes, they merely provide for the freezing or supervision of transactions involving the assets until a federal license is granted. After the frozen property here involved was vested by the Alien Property Custodian, however, the claims of American creditors were protected by the Trading with the Enemy Act, which furnishes an exclusive and adequate remedy for creditors. Sec. 34, 60 Stat. 925, 50 U. S. C. App. 34; *Cabell* v. *Markham*, 69 F. Supp. 640 (S. D. N. Y.).

have refused to recognize or enforce rights claimed to have been acquired by unlicensed private transactions. *Clark* v. *Chase National Bank* and *Clark* v. *Federal Reserve Bank*, unreported, S. D. N. Y., Cir. No. 44-618, 1948, denied all force to asserted liens based upon unlicensed attachments of blocked property. In *Okihara* v. *Clark*, 71 F. Supp. 319 (D. Hawaii), an unlicensed deed of land was held ineffective. In *Heyden Chemical Co.* v. *Clark*, unreported, S. D. N. Y., Cir. No. 37-548, 1948, it was held that an unlicensed agreement to transfer stock conferred no rights on the intended transferee. See also, *The Kotkas*, 35 F. Supp. 983, 985 (E. D. N. Y.); *Blank* v. *Clark*, 79 F. Supp. 373 (E. D. Pa.).

Among state courts, only those of New York have construed the Executive Order. These courts have expressed a different view of the effect of the Order than have the federal courts. In the first case to come before the New York Court of Appeals, *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N. Y. 332, 43 N. E. 2d 345, that court sustained the exercise of jurisdiction over a nonresident defendant by an attachment of its funds within the state, an attachment made without a license issued under Executive Order No. 8389. In so doing, however, the New York court rejected the view, adopted by the lower state courts, that the effect of the Executive Order was to forbid payment and not the assignment of a

claim or property. The New York Court of Appeals appears to have held, in accordance with the suggestion made to it by the United States as *amicus curiae*, that no conflict with the Executive Order would result from the exercise of jurisdiction by the state court through the recognition of an attachment which would create no lien and be subject to federal license. See pp. 28–30, *supra*; Paragraph 4, General Ruling No. 12 (App., pp. 63–64). In *Singer* v. *Yokohama Specie Bank*, 293 N. Y. 542, 58 N. E. 2d 726, however, the same court held that the plaintiff was entitled to go to trial on the question of the rights acquired by it by a transfer of credit which was prohibited by the Executive Order. The court seems to have taken the view that by reason of the provisions of paragraph 4 of General Ruling No. 12, courts are authorized to enter judgment declaring unconditionally that rights and obligations have been created by unlicensed transactions, with the single qualification that the freezing regulations prevent payment of such judgments without a federal license. The question was recently reargued before the New York Court of Appeals on an appeal from a judgment made after trial in the *Singer* case, and is presently *sub judice*.

A number of other cases in New York seem to have held, similarly, that judicial action may create or give recognition to enforceable rights in

blocked property, subject only to the requirement of a federal license prior to payment or physical transfer of possession.[30] Still other New York cases, however, have held, consistently with the decision below, that private transfers of interests in blocked property are prohibited.[31]

The Court of Appeals for the Second Circuit recognized that its decision was in conflict with that of the New York Court of Appeals in *Singer* v. *Yokohama Specie Bank* and expressly repudiated the New York court's decision, both in the opinion below (II R. 45) and again, more recently, in *Bernstein* v. *N. V. Nederlandsche-Amerikaansche, etc.*, C. A. 2, No. 141, October Term, 1948, February 21, 1949, slip opinion, pp. 839–40. For the reasons already indicated, we think it clear that the decision below was compelled by the terms of the Order and the regulations.

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[30] See, e. g., *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431 (Sup. Ct., N. Y. Co.), affirmed, 272 App. Div. 909, 72 N. Y. S. 2d 409 (1st Dept.), affirmed, 297 N. Y. 1019, 80 N. E. 2d 538; *Cable & Wireless Ltd.* v. *Yokohama Specie Bank*, 191 Misc. 567, 79 N. Y. S. 2d 597 (Sup. Ct. N. Y. Co.); *Metallo-Chemical Corp.* v. *Banque Transatlantique*, 188 Misc. 596 (City Ct. N. Y. Co.); *Drewry* v. *Onassis*, 188 Misc. 912, 69 N. Y. S. 2d 850, affirmed, 272 App. Div. 870, 72 N. Y. S. 2d 262 (1st Dept.); *R. & L. Goldmuntz Sprl* v. *Fischer*, 54 N. Y. S. 2d 635 (Sup. Ct. N. Y. Co.).

[31] *Patino* v. *Patino*, 186 Misc. 381, 59 N. Y. S. 2d 58 (Sup. Ct., N. Y. Co.); *Philipp* v. *Chase Nat. Bank*, 34 N. Y. S. 2d 465 (Sup. Ct., N. Y. Co.); *In re Giovanozzi's Estate*, 57 N. Y. S. 2d 528 (Surr. Ct., N. Y. Co.); *Koninklijke Lederfabriek, etc.* v. *Chase Nat. Bank*, 177 Misc. 186, 30 N. Y. S. 2d 518 (Sup. Ct., N. Y. Co), affirmed, 263 App. Div. 815, 32 N. Y. S. 2d 131 (1st Dept.).

II

THE PETITIONER DID NOT ACQUIRE TITLE TO THE FUND BY HIS APPOINTMENT AS TEMPORARY RECEIVER TWO DAYS BEFORE THE DATE ON WHICH THE FREEZING REGULATIONS WERE APPLIED TO PROPERTY OF AUSTRIAN NATIONALS

In Point I, *supra*, we have shown that if petitioner did not have title to the funds in suit prior to June 14, 1941, nothing that occurred on or after that date could be effective, in view of the absence of a federal license, to give him title. Petitioner argues, however, that he acquired title, or that the New York court took custody of *in rem* rights to A. K. M.'s claim against ASCAP, on the petitioner's appointment as temporary receiver on June 12, 1941, prior to the effective date of the freezing controls.

1. The question of petitioner's rights as temporary receiver has been determined, adversely to the petitioner, by both the lower courts (I R. 146–147; II R. 43–44). The issue is a narrow question of construction of a New York statute which has been given full consideration by the courts below, composed of judges of long experience in that law. As the precise question of state law is novel, it cannot be urged that there has been a departure from the state law requiring the supervisory action of this Court.[32] In these cir-

[32] The Court of Appeals properly rejected the suggestion that it refer the case, together with the important federal questions involved, to the state courts. *Markham* v. *Allen*,

cumstances the decisions below should stand. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Helvering* v. *Stuart*, 317 U. S. 154; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708.

2. Moreover, an examination of the statute, Section 977–b, New York Civil Practice Act (App. pp. 71–80) shows that the courts below were clearly correct in holding that petitioner took no title by his appointment as temporary receiver. Without support in the statute, petitioner's claim to title must concededly fail, but that support cannot be summoned by reading isolated provisions out of their context. Instead, these provisions must be fitted into and read in the light of the statutory scheme as a whole.

Thus read, the text and general scheme of the statute demonstrate that the temporary receiver takes no title. The act sets out, in logical order and in detail, the provisions for receiverships of

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326 U. S. 490; *Meredith* v. *Winter Haven*, 320 U. S. 228. The Court of Appeals pointed out (II R. 45–46) that cases in which questions of state law have been referred to the state courts, such as *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496; *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168; and *Musser* v. *Utah*, 333 U. S. 95 (cited by the petitioner, Brief, p. 21), are based on this Court's reluctance unnecessarily to decide constitutional, and similarly delicate, questions. They are inapplicable here, where "unusually important federal rights" are involved (II R. 46), and there is no constitutional issue

foreign corporations where they have been dissolved, had their charters annulled, or ceased to do business. Subdivision 1 authorizes an action for the appointment of a receiver under these circumstances. Any creditor may bring the suit (subd. 2) and service may be made in person or by publication (subd. 3). Subdivision 4 provides that, if personal service within the state cannot be effected, the plaintiff may apply *ex parte*, on specified papers, for the appointment of a "temporary receiver pending the determination of the action," who shall file such an undertaking as the Court directs and "who * * * shall take, receive and reduce to his possession" any assets of the foreign corporation and "hold the same until the further order of the court." [33] It was pursuant to this subdivision that on June 12, 1941, the petitioner was appointed temporary receiver of the assets

[33] A temporary receiver *must* be appointed, where personal service cannot be effected on the defendant corporation, on the filing of a verified complaint *alleging* that the corporation has been dissolved, annulled, or ceased to do business. No trial, or preliminary determination, of the issue of dissolution is had prior to the appointment of the temporary receiver, Subd. 4, App. p. 72. The conclusion of the courts below that no title passed on the petitioner's appointment as temporary receiver is the more supported by the unlikelihood that it was intended that title pass in an *ex parte* proceeding, on no more than an allegation of the requisite facts, and by the lack of necessity that a temporary receiver acquire more than a right to possesion in order to perform his statutory duties.

of A. K. M. and directed to reduce to possession its assets in New York [34] (I R. 49–51).

The statute further provides that after the service of a copy of the order of appointment and a demand made on a person who holds corporate property or against whom a claim in favor of the corporation exists, an order may be made for service by publication (subd. 5). The nature of the publication is specified (subd. 6); it must be begun within sixty days of the appointment of the temporary receiver (subd. 7). Service of the summons shall be deemed complete within ten days after the date of the last publication; the action is deemed commenced upon the issuance of summons (subd. 8). If an answer is made, the case may be set down on the preferred calendar (subd. 9). On default (or after trial and findings that the corporation has ceased to do business,

[34] A preliminary difficulty with petitioner's argument that he took title before June 14, 1941, is that the record does not show that he qualified as temporary receiver before that date. The order appointing him temporary receiver, dated June 12, 1941, provided that he should "before entering upon the duties of his trust" execute and file a bond in a specified amount (I R. 50). While it appears that petitioner qualified as temporary receiver some time on or before July 7, 1941 (I R. 52–55), the petitioner adduced no evidence to show, and has at no time alleged, that he so qualified on either June 12 or June 13. It is settled law in New York that no rights pass to a receiver until he files the required bond. *Moran* v. *Sturges*, 154 U. S. 256 (dealing with New York law); *Smith* v. *Nannen*, 231 App. Div. 234, 247 N. Y. Supp. 47 (1st Dept.); *Edgerly* v. *Blackburn*, 140 App. Div. 419, 125 N. Y. Supp. 353 (1st Dept.).

been dissolved, liquidated, nationalized, or annulled) the court must enter judgment appointing a permanent receiver (subd. 10).

In contrast to the temporary receiver, who by Subdivision 4 is directed merely to reduce assets to possession and hold them until further order of the court, the permanent receiver is, under Subdivision 10, to "liquidate" the assets and to that end is to reduce them to cash, give notice to creditors requiring them to prove their claims within a set time (subd. 11), allow or disallow claims, submit accounts to the court and make distributions to creditors (subds. 13–17). The statute of limitations is the subject of Subdivision 18. Subdivision 19 provides for the powers of the permanent receiver, and Subdivision 12 generally for the additional powers of receivers. The petitioner relies on both Subdivisions 12 and 19.

Subdivision 19 provides that title to all assets shall vest in "the receiver" upon the making of the order appointing him. Read in its context, this subdivision clearly relates only to the permanent receiver, whose appointment, powers and duties are specified in Subdivisions 10–11 and 13–17.[35] Those subdivisions, after the initial mention of the permanent receiver in Subdivision 10, consistently refer to such a receiver as "the re-

[35] Subdivision 12 relates to "any receiver" and is discussed below (pp. 47–48). Subdivision 18 relates to the suspension of the statute of limitations. It is of general applicability, and refers to the time of the appointment of "a" receiver.

ceiver." As has been seen, the plan of the statute is plainly chronological. The nature of the action, the method of service, the appointment of the temporary receiver, and matters relating to the trial of the foreign corporation's status are dealt with in Subdivisions 1–9. Subdivision 10 begins, so to speak, a new chapter by its provision for final judgment appointing the permanent receiver.

That Subdivision 19 relates only to the permanent receiver is confirmed by Subdivision 4, which authorizes the appointment of the temporary receiver and contains the sole specification of his duties to be found in the statute. The temporary receiver "shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court." These words were repeated in the order appointing the petitioner (I R. 50). There is nothing in this statement of the duties of the petitioner which would make it appropriate that he take title to the corporate assets. When Subdivision 4, giving the temporary receiver a right to possession only, is read with Subdivision 19, giving the permanent receiver title, it becomes clear that Subdivision 4 implicitly denies title to the temporary receiver. Furthermore, since the temporary receiver must be appointed without proof of the facts justifying the receivership, without notice to the corporation, and with no room for the exercise of the court's discretion (*supra*, p. 43), it is most unlikely that

such appointment was intended to invest the receiver automatically with title to all of the corporation's assets.

Appellant relies also upon Subdivision 12, which provides:

> Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

The difficulty with the argument based on this subdivision is that it overlooks the phrase "in addition to those herein provided for," as well as the express provisions of Subdivision 4. Of the argument based on Subdivision 12 the Court of Appeals said (II R. 43–44):

> Appellant reasons that "any receiver" includes a temporary one and accordingly that he has the powers of a permanent receiver. We think his argument proves too much. Subd. 4 defines the temporary receiver's powers and states that he can reduce the property to possession. It does not even suggest that he takes title. Clearly there would be little purpose in spelling out restricted powers there if the later subdivision was intended to make them unlimited. To do so would set at naught the distinction between a temporary and permanent receiver so obviously intended by the language of the statute. More readily the quoted language should

be read to mean that a temporary receiver under this provision takes the usual powers of other temporary receivers in New York.

3. By an argument not advanced below, the petitioner seeks now to establish (Brief, pp. 17–21) that, quite apart from the provisions of Subdivisions 12 and 19, title vested in him as temporary receiver as part of the plan of the statute for the exercise of *in rem* jurisdiction over the assets of the defendant corporation. Aside from the question of the permissibility of an "interference" by the federal courts with state court jurisdiction *in rem* (*infra*, pp. 53–55), it is plain that such jurisdiction was not here exercised by the state court, prior to June 14, 1941.

The petitioner urges that under Section 977–b, the court gains its *in rem* jurisdiction to liquidate the foreign corporation's assets by two acts only—the appointment of a temporary receiver and service by publication—and that constructive service would be totally ineffective, under the jurisdictional requirements of the Fourteenth Amendment, to confer jurisdiction if the prior appointment of the temporary receiver did not amount to a seizure and vesting in him of the corporation's assets. By petitioner's appointment, he argues, the state court necessarily took custody or possession of A. K. M.'s assets, and, therefore, the courts below either wrested this possession from the state court, or must be taken to have held that the statute failed, because of

a constitutional bar, to achieve *in rem* jurisdiction in the state court by constructive service.

The fatal defect of this argument is the omission, in the statement of the prerequisites for constructive service, of a most significant requirement, intermediate between the appointment of the temporary receiver (subd. 4), and the order directing service by publication (subd. 5). The omitted requirement is that before service by publication may be authorized, a demand must be made by the temporary receiver upon a person holding property of the corporation or against whom there is a claim by the corporation (subd. 5), in this case, upon ASCAP. The demand, by the provisions of Subdivisions 20, is the method by which possession of assets is obtained. It is thus clear that the constructive service, and the *in rem* jurisdiction contemplated by the statute, rest not on the mere appointment of the receiver, but rather on the possession by the temporary receiver of tangible or intangible property within the state, a possession obtained by the service of a demand upon the person holding the property.[36] In this case, the only asset of A. K. M. was the claim against ASCAP, and the requisite demand was not served upon ASCAP until July 9, 1941 (I R. 76, 96, 52–55),

[36] The action is not deemed commenced until the issuance of the summons (subd. 8) which occurs after the temporary receiver's service of a demand for the corporation's assets (subd. 5).

almost a month after freezing controls became effective on June 14, 1941. Accordingly, custody or *in rem* jurisdiction was never achieved.

4. The holding of the Court of Appeals conforms to the general rule in New York, derived from equity practice and applied as well to statutory receiverships, that a temporary receiver does not take title to any assets but merely acquires a right to possession. *Keeney* v. *Home Ins. Co.*, 71 N. Y. 396; *Decker* v. *Gardner*, 124 N. Y. 334, 26 N. E. 814; *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. Supp. 101 (2d Dept.); *In re French*, 181 App. Div. 719, 168 N. Y. Supp. 988 (1st Dept.), affirmed, 224 N. Y. 555, 120 N. E. 863; *Stokes* v. *Hoffman House*, 167 N. Y. 554, 60 N. E. 667; *Mercantile Trust Co.* v. *Kings Co. El. Ry. Co.*, 40 App. Div. 141, 57 N. Y. Supp. 892 (2d Dept.); *Metropolitan Life Ins. Co.* v. *Sanborn*, 34 Misc. 531, 69 N. Y. Supp. 1009 (Sup. Ct. App. Term). See 2 Clark, *Receivers* (1929), Sec. 718. Cf. N. Y. General Corporation Law, Secs. 110, 162, 163, 168.[37] The same rule prevails in other jurisdictions. See Alderson, *Receivers* (1905), Secs. 4, 188.

Since the decision below, the petitioner has found a New York case containing language which taken from context, seems to point the

[37] Comparisons between equity and statutory receivers in the early cases may be misleading for the reason that prior to 1880 there were no temporary statutory receivers. Statu-

other way, *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, 45, 44 N. E. 944, 945. (It should be noted that neither this case, nor the cases cited above which present the general law of New York, were decided under Sec. 977-b of the New York Civil Practice Act (App., pp. 71–80); the statute pursuant to which the petitioner was appointed.) The *Nealis* case was a suit by a temporary receiver based on a fraudulent conveyance by the insolvent corporation in receivership. The court rejected the defense that the receiver was required to join the corporation as a defendant. Such joinder, the court said,

> would be inconsistent with the appointment of the temporary receiver, who for the purposes of holding, protecting and reducing to possession the property and assets of the company, is vested with title * * * [150 N. Y. at 45, 44 N. E. at 45].

It is clear that the court was using the word title loosely, in the sense of the receiver's statutory authority to reduce assets to possession and to

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tory receivers corresponded to the present permanent receivers and took title. New York Rev. Stat. pt. 3, c. 8, tit. 4, art 3, secs 66–68, 3 N. Y. Rev. Stat. (6th ed. 1875), p. 754. See *Herring* v. *New York, L. E. & W. R. Co.*, 105 N. Y. 340, 371, 372–373, 375–379, 389–390, 12 N. E. 763, 773, 774, 775, 777, 782; Note, 19 Abbott's New Cases (N. Y.) 359.

The first statutory provisions for temporary receivers appeared in 1880 and 1889. N. Y. Laws 1880, Ch. 178, Code of Civil Procedure, Secs. 1788–89; N. Y. Laws 1889, Ch. 314, Code of Civil Procedure, Sec. 2423. These provisions are now in substance contained in Secs. 110, 162, N. Y. General Corporation Law.

bring suits.[38] In the course of its opinion the court stressed this aspect, and said that the policy of the statute there involved required that "title of the corporate property should be vested in an officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceeding necessary in the premises" (150 N. Y. at 45, 44 N. E. at 945). Indeed, the statute involved explicitly gave the receiver such authority. N. Y. Laws 1880, Ch. 178, Code of Civil Procedure, Sec. 1788,

[38] Other New York cases, also cited by the petitioner for the first time (Brief, p. 28) are equally irrelevant. Thus, in *Johnson* v. *Rayner*, 25 App. Div. 598, 599–600, 49 N. Y. Supp. 959, 960 (1st Dept.), the temporary receiver had been authorized by the Court to sell, doubtless in pursuance of Sec. 2423, Code of Civil Procedure (*supra*, fn. 37) which authorizes the grant to the temporary receiver of the additional powers of the permanent receiver. Accordingly, a sale by him was upheld. As in *Nealis* v. *American Tube & Iron Co.*, the reference to the title of the temporary receiver was in the sense of his authority to carry out the functions explicitly assigned to him. See *infra*, p. 53, fn. 39. In *Frank* v. *Lutton*, 267 App. Div. 703, 48 N. Y. S. 2d 137 (3d Dept.), in the course of supplementary proceedings for the collection of a judgment, the judgment creditor obtained the appointment of a receiver under Section 807, Civil Practice Act. That section, as in the case of the pre-1880 statutes (*supra*, fn. 37) makes no distinction between a temporary and permanent receiver; the property of the judgment debtor "is vested in a receiver." *Prince* v. *Schlesinger*, 116 App. Div. 300, 101 N. Y. Supp. 1031 (1st Dept.), involves a permanent statutory receiver. *Nat. Park Bank* v. *Clark*, 92 App. Div. 262, 87 N. Y. Supp. 185 (1st Dept.) determined that an attachment took precedence over the rights of an ancillary, temporary receiver subsequently appointed.

see fn. 37, *supra*. It is significant that in three cases decided after 1896, the year of the decision in the *Nealis* case, the New York courts held that a temporary receiver under the same statute did not acquire general title. *Mutual Brewing Co.* v. *New York & College Point Ferry Co.*, 16 App. Div. 149, 45 N. Y. S. 101 (2d Dept. 1897); *Metropolitan Life Ins. Co.* v. *Sanborn*, 34 Misc. 531, 69 N. Y. S. 1009 (Sup. Ct., App. Term); *In re French*, 181 App. Div. 719, 168 N. Y. S. 988 (1st Dept.), affirmed, 224 N. Y. 555, 120 N. E. 863; but *cf. Johnson* v. *Rayner*, 25 App. Div. 598, 49 N. Y. Supp. 959, 960–1 (1st Dept.); *Matter of Simth Co.*, 31 App. Div. 39, 41–2, 52 N. Y. Supp. 877, 883–4, (1st Dept.) [39]

5. The petitioner further claims (Brief, pp. 17–21) that the decision below is an interference with the *in rem* jurisdiction or custody of the state court.[40] We have already shown (pp. 28–30, *supra*) that such *in rem* jurisdiction was not sought to be exercised until after the institution of freezing controls, and that it was, therefore, inoperative.

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[39] While the language in these cases is to the effect that the temporary receiver takes title, as in *Nealis* the use of the word "title" was in the sense of the receiver's right or authority to carry out his statutory functions of preserving the property in his possession.

[40] The petitioner makes this contention, although a variant of this question appears to have been raised by the fourth question in the petition for writ of certiorari (Pet., p. 7), which is not within the limited grant of the writ (*supra*, p. 2).

Even assuming that *in rem* jurisdiction or possession of the claim against ASCAP was obtained, it is, as the court below observed, a fallacy to suggest that it is decisive (II R. 46). There has been no interference either with the administration of the receiver's affairs or with assets physically in the hands of the receiver or of the state court. Indeed, the actual funds in suit are held neither by the state court nor the petitioner, its receiver, but rather by ASCAP, a third party. The Custodian has sought, as is his unquestioned right, the aid of the federal courts to enforce an order under the Trading with the Enemy Act. Sec. 17, 40 Stat. 411, 50 U. S. C. App. 17; *Markham* v. *Allen*, 326 U. S. 490. He joined the petitioner as a defendant merely because the petitioner was asserting a claim to the same assets. The Custodian has never sought a judgment requiring the petitioner or any other officer of the state court to pay anything over to him, and the judgment here appealed from does not do so. As against the petitioner the Custodian has sought and has been granted below, only an adjudication of their respective rights to the funds in the hands of ASCAP (I R. 153).

The position of the Custodian here is even stronger than it was in *Markham* v. *Allen, supra*. There the federal courts undertook to determine ultimate rights in a fund actually in the hands of and being administered by a state court. Here, the federal courts have determined rights of the

Custodian to a fund in the hands of a third party. The suggestion is untenable that merely because another claimant to that fund happens to be a state receiver the federal courts are deprived of jurisdiction over this federal cause of action. Cf. *Fischer* v. *American United Ins. Co.*, 314 U. S. 549.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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MARCH 1949.

APPENDIX

1. Joint Resolution of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency; and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision

has any interest, including the production of any books of account, contracts, letters, or other papers, in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

* * * * *

2. Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended, 50 U. S. C. 1 et seq.:

* * * * *

SEC. 5, as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839, 50 U. S. C. App. 616:

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving,

any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property, shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

3. First War Powers Act, 1941, Title III, c. 593, 55 Stat. 838, 840:

* * * * *

SEC. 302. All acts, actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by, or pursuant to the direction of, the President or the Secretary of the Treasury under the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, which would have been authorized if the provisions of this Act and the amendments made by it had been in effect, are hereby approved, ratified, and confirmed.

* * * * *

4. Executive Order No. 8389, April 10, 1940, 5 F. R. 1400, as amended by Executive Order 8785, June 14, 1941, 6 F. R. 2897:

By virtue of and pursuant to the authority vested in me by Section 5 (b) of the Act of October 6, 1917 (40 Stat. 415), as amended, by virtue of all other authority vested in me, and by virtue of the existence of a period of unlimited national emergency, and finding that this Order is in the public interest and is necessary in the interest of national defense and security, I FRANKLIN D. ROOSEVELT, PRESIDENT OF THE UNITED STATES OF AMERICA, do prescribe the following:

SEC. 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of any foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarkings of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exportations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions.

* * * * *

SEC. 3. The term "foreign country designated in this Order" means a foreign country included in the following schedule, and the term "effective date of this Order" means with respect to any such foreign country, or any national thereof, the date specified in the following schedule:

* * * * *

(j) June 14, 1941—

* * * * *

Austria

* * * * *

SEC. 5.

* * * * *

E. The term "national" shall include,

* * * * *

(ii) Any partnership, association, corporation or other organization, organized under the laws of, or which on or since the effective date of this Order had or has had its principal place of business in such foreign country, or which on or since such

effective date was or has been controlled by, or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, such foreign country and/or one or more nationals thereof as herein defined,

* * * * *

F. The term "banking institution" as used in this Order shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part of his business, or brokers; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate "banking institution."

* * * * *

SEC. 7. Without limitation as to any other powers or authority of the Secretary of the Treasury or the Attorney General under any other provision of this Order, the Secretary of the Treasury is authorized and empowered to prescribe from time to time regulations, rulings, and instructions to carry out the purposes of this Order and to provide therein or otherwise the conditions under which licenses may be granted by or through such officers or agencies as the Secretary of the Treasury may designate, and the decision of the Secretary with respect to the granting, denial or other disposition of an application of license shall be final.

* * * * *

5. General Ruling No. 4, June 3, 1940, 5 F. R. 2133, as amended, May 24, 1941, 6 F. R. 2584:

> Except as specifically provided herein or otherwise, all definitions appearing in Executive Order No. 6560 of January 15, 1934, as amended by Executive Order No. 8389 of April 10, 1940, as amended, and the Regulations issued thereunder, shall apply to the terms employed in all rulings, licenses, instructions, etc., and, in addition, the following definitions and rules of interpretation are prescribed:
>
> (1) The term "Order" shall mean Executive Order No. 8389, as amended.
>
> * * * * *
>
> (4) The term "blocked country" shall mean any foreign country designated in the Order.
>
> * * * * * *
>
> (8) The term "blocked account" shall mean an account in which any blocked country or national thereof has an interest, with respect to which account payments, transfers or withdrawals or other dealings may not be made or effected except pursuant to a license authorizing such action. The term "blocked account" shall not be deemed to include free dollar accounts of the type referred to in General License No. 32, as amended, or the accounts of generally licensed nationals.
>
> * * * * *

6. General Ruling No. 12, April 21, 1942, 7 F. R. 2991:

> (1) Unless licensed or otherwise authorized by the Secretary of the Treasury, (a) any transfer after the effective date of [Executive Order No. 8389, see General Ruling No. 4, par. (1), *supra*] is null and

void to the extent that it is (or was) a transfer of any property in a blocked account at the time of such transfer; and (b) no transfer after the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account (irrespective of whether such property was in a blocked account at the time of such transfer).

(2) Unless licensed or otherwise authorized by the Secretary of the Treasury, no transfer before the effective date of the Order shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any property while in a blocked account unless the person with whom such blocked account is held or maintained had written notice of the transfer or by any written evidence had recognized such transfer prior to the effective date of the Order.

(3) Unless otherwise provided, an appropriate license or other authorization issued by the Secretary of the Treasury before, during, or after a transfer shall validate such transfer or render it enforceable to the same extent as it would be valid or enforceable but for the provisions of section 5 (b) of the Trading with the Enemy Act, as amended, and Order, regulations, instructions and rulings issued thereunder.

(4) Any transfer affected by the Order and/or this general ruling and involved in, or arising out of, any action or proceeding in any Court within the United States shall, so far as affected by the Order and/or this general ruling, be valid and enforceable for the purpose of determining for the parties to the action or proceeding the rights and

liabilities therein litigated; *Provided, however,* That no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license.

(5) For the purposes of this general ruling:

(a) The term "transfer" shall mean any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the appointment of any agent, trustee, or other fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition, or the exercise of any power of appointment, power of attorney, or other power; *Provided, however,*

That the term "transfer" shall not be deemed to include transfers by operation of law.

(b) The term "property" includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2 (1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing. The term "property" shall not, except to the extent indicated, be deemed to include chattels or real property.

(c) The term "blocked account" shall refer to a blocked account (including safe deposit box) of a party to the transfer and shall have the meaning prescribed in General Ruling No. 4 except that it shall not be deemed to include an account not treated as a blocked account by the person with whom such account is held or maintained.

(d) The term "effective date of the Order" shall have the meaning prescribed in General Ruling No. 4 except that "the effective date of the Order" as applied to any person whose name appears on The Proclaimed List of Certain Blocked Nationals shall be the date upon which the name of such person first appeared on such list.

(e) The term "transfer by operation of law" shall be deemed only to mean any transfer of any dower, curtesy, community property, or other interest of any nature whatsoever, provided that such transfer arises solely as a consequence of the existence or change of marital status; any transfer to any person by intestate succession; any transfer to any person as admin-

istrator, executor, or other fiduciary by reason of any testamentary disposition; any transfer to any person as administrator, executor, or fiduciary by reason of judicial appointment or approval in connection with any testamentary disposition or intestate succession; and any transfer pursuant to (i) Netherlands Royal Decree of May 24, 1940, and (ii) Norwegian Provisional Decree of April 22, 1940, concerning the monetary system, etc.

(6) Nothing contained in this general ruling shall be deemed to affect in any way criminal liability for violation of the Order, or the regulations, rulings, circulars, or instructions issued thereunder, or in connection therewith, or to otherwise modify any provision thereof.

By direction of the President.

7. Public Circular No. 31, August 2, 1946, 11 F. R. 8351:

(1) Reference is made to General Ruling No. 12 relating to unlicensed transfers of blocked property. Reference is also made to General Ruling No. 19 relating to the release of Treasury controls over property vested by the Alien Property Custodian. This circular deals with the effect of such release on unlicensed attachments levied with respect to blocked property prior to the vesting thereof by the Custodian.

(2) Under paragraph (1) of General Ruling No. 12, interests in blocked property cannot be acquired, transferred, or created by unlicensed "transfers." Nor may an unlicensed transfer be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(3) An attachment is a "transfer." See paragraph (5) of General Ruling No. 12 where the term "transfer" is defined as including "the issuance, docketing, filing, or other levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order, or the service of any garnishment." An unlicensed attachment, therefore, cannot operate to transfer or create any interest in blocked property. Nor can it serve as a basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or interest in, any blocked property.

(4) Paragraph (4) of General Ruling No. 12 does not constitute a license authorizing the seizure or creation of any interest in blocked property by attachment proceedings or other legal process. This paragraph merely is a formal statement of the position which the Treasury Department has always taken with respect to litigation affecting blocked property—that it does not desire to interfere with such litigation so long as it is clearly understood that the judicial process cannot, without a license or other authorization from the Secretary of the Treasury, operate to transfer or create any interest in blocked property. Thus the proviso of paragraph (4) specifies that "no attachment, judgment, decree, lien, execution, garnishment, or other judicial process shall confer or create a greater right, power, or privilege with respect to, or interest in, any property in a blocked account than the owner of such property could create or confer by voluntary act prior to the issuance of an appropriate license." In issuing paragraph

(4), the Treasury Department did not undertake to decide for the courts whether they should exercise jurisdiction. It simply prescribed that jurisdiction could be exercised only on the basis that if a Treasury license was not issued, the judicial process could not operate to transfer or create any interest in blocked property, nor could it be the basis for the assertion or recognition of any other right, remedy, power, or privilege with respect to the property.

(5) The Treasury Department has always considered that when the Alien Property Custodian has vested any property, it would not be in the national interest for the Treasury Department thereafter to grant licenses authorizing the creation or acquisition of any interest in the property. Formerly it was the practice of the Department, whenever it was notified by the Custodian that a particular property had been vested, to issue a specific release to the Custodian of all control of the property under Executive Orders Nos. 8389 and 9193. Paragraph (1) of General Ruling No. 19 constitutes a general release of such control in the case of all German and Japanese property vested by the Custodian. Paragraph (2) of the General Ruling is intended to make it clear that a release of control over any vested property to the Alien Property Custodian, whether by specific release or by reason of the General Ruling, operates as a final denial by the Secretary of the Treasury of any pending application for license or other authorization relating to such property and that no application for a license authorizing the creation, acquisition, or transfer of any interest in such property will thereafter

be entertained or granted. The paragraph is thus a formal statement of what has always been the position of the Treasury Department—namely, that once blocked property has been vested by the Custodian, there is no longer any possibility that an unlicensed attachment may ripen through the issuance of a Treasury license into a seizure and acquisition of an interest in such blocked property.

(6) In view of the fact that the Alien Property Custodian has publicly announced his intention of vesting all German and Japanese property in the United States, it will be the general policy of the Treasury Department not to grant any licenses authorizing the creation or acquisition through legal process of any interest in blocked German or Japanese property.

8. Title 31—Code of Federal Regulations.—Chapter 1, Part 130, issued April 10, 1940 (5 F. R. 1401):

* * * * *

§ 130.2 *Definitions.* * * *

* * * * *

(c) The terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness or obligations, financial securities commonly dealt in by bankers, brokers, and investment houses, notes, debentures, stocks, bonds, coupons, bankers' acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, other evidences of title or ownership, goods, wares, merchandise, chattels, stocks on

hand, ships, goods on ships, real estate mortgages, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, insurance policies, safe deposit boxes and their contents, annuities, etc.

* * * * *

9. Title 31—Code of Federal Regulations.—Chapter I, Part 130, issued June 14, 1941 (6 F. R. 2905):

* * * * *

§ 130.2 *Definitions.* * * *

* * * * *

(c) The terms "property" and "property interest" or "property interests" shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness or obligations, financial securities commonly dealt in by bankers, brokers, and investment houses, notes, debentures, stocks, bonds, coupons, bankers' acceptances, mortgages, pledges, liens or other right in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or copyrights, insurance policies, safe deposit boxes and their

contents, annuities, pooling agreements, contracts of any nature whatsoever, et cetera:

* * * * * *

10. Sec. 977-b, New York Civil Practice Act, Laws 1936, ch. 917, as amended, Laws 1938, ch. 604, Laws 1941, ch. 926:

RECEIVERS TO LIQUIDATE LOCAL ASSETS OF FOREIGN CORPORATIONS

1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corpora-

tion, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified complaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice, to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant

to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six consecutive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made.

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment *appointing* a perr nent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and a statement showing the name and address of each and every claimant and the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership.

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances.

15. Upon the return date of such application, or at such other time fixed by the

court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner: a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses, including attorneys' fees, in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with

their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto.

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof, until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its

existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corpora-

tion within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible unders the laws of such domicile.

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor.

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation.

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or

his predecessor in interest, of any assets of said corporation in the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof, to any person or circumstance be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared separable.

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Supreme Court of the United States

October Term, 1948
No. 390

HENRY M. PROPPER, as Receiver of the Property and Assets, within the State of New York of A. K. M.,
Petitioner,

against

TOM C. CLARK, Attorney General, as Successor to the Alien Property Custodian,
Respondent.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF DEEMS TAYLOR TO AMEND THE DOCKET OF THIS COURT SO AS TO INCLUDE SAID DEEMS TAYLOR, AS PRESIDENT OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS AS A RESPONDENT ON THIS APPEAL

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Motion

Now comes Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter called ASCAP), an unincorporated association of more than seven members, by his attorney Louis D. Frohlich and moves the Court that the docket be amended so as to include ASCAP as a respondent on this appeal.

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* Figures in parenthesis refer to page numbers in the Transcript of Record, Vol. 2.

In explanation of the above motion, the following is submitted:

Petitioner filed an application for a writ of certiorari on October 30, 1948. That petition failed to designate ASCAP as a party to the action. Certiorari was granted on January 3, 1949 and argument is now set for the week of March 28th, 1949.

This case now appears on the docket of this Court without any mention of the fact that ASCAP has any interest in the subject matter of the action, although the judgment under review directs ASCAP to pay the Attorney General, the respondent herein, the sum of $46,839.54.

Since the inception of this action on or about April 23, 1946 (1), ASCAP has actively participated in all of the proceedings taken herein. It was designated as a party on the appeal to the Court of Appeals and is so referred to in the statement under Rule 15(b), as well as throughout that record. ASCAP was the defendant-appellee on that appeal to the Court of Appeals (28, 29, 34-40), a brief was filed in that Court on its behalf and the appeal was argued by one of my partners (40).

Shortly after a copy of the petition for the writ of certiorari was served on me, my office was advised that, by reason of the importance of the question involved, the Attorney General expected to join in a portion of the application. Accordingly, no papers were filed on behalf of ASCAP in opposition to the application for the writ, in the belief that certiorari would be granted as a matter of course.

The writ was granted on January 3, 1949. Thereafter, nothing further was heard about the matter. My office was never consulted about the record, nor was any copy thereof served upon me prior to March 7th, 1949 at which time, the Clerk of this Court mailed a copy of the record to me pursuant to written request for same. At the same time, the Clerk advised me that ASCAP had no standing to be heard on the appeal to this Court unless a motion was made for that purpose.

It is respectfully submitted that ASCAP should not be deprived of an opportunity to be heard on this appeal simply because petitioner has arbitrarily seen fit to ignore it as a party. A disposition of this appeal, without an opportunity for ASCAP to be heard, where its property is the subject of the appeal, would be a denial of due process. It is respectfully requested that the docket of this Court be amended as hereinabove indicated, so that ASCAP may be afforded an opportunity to file a brief and be heard on the argument hereof.

Respectfully submitted,

Louis D. Frohlich,
Attorney for Respondent Deems Taylor as President of American Society of Composers, Authors and Publishers.

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against

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT DEEMS TAYLOR

LOUIS D. FROHLICH,
Attorney for Defendant Deems Taylor, as President of the American Society of Composers, Authors and Publishers.

HERBERT T. JACOBY,
On the Brief.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF DEFENDANT DEEMS TAYLOR

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (II R. 4) is reported at 169 Fed. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for lack of finality is reported at 163 Fed. 2d 940.

Jurisdiction

The judgment of the Court of Appeals was rendered on August 3, 1948 (H R. 47). The petition for writ of certiorari was filed October 30, 1948 and granted in part on January 3, 1949. The jurisdiction of this Court is founded on Section 1254 of Title 28 of the United States Code.

Questions Presented

Petitioner claims to have been designated by a New York court as the temporary receiver of the assets of an Austrian national, which appear to have consisted solely of an alleged debt from a third person. The appointment took place two days before the "freezing" by Executive Order of all transactions in Austrian property. After the date of "freezing", petitioner was designated permanent receiver. Some time thereafter the alleged debt was vested by the Alien Property Custodian.

The writ of certiorari is limited to the following questions:

(1) Whether, under New York law, title to the debt in suit passed to the petitioner prior to the date of "freezing", by virtue of his appointment as temporary receiver.

(2) Whether, in the absence of license, title to the debt in suit passed to the petitioner after the date of "freezing", by virtue of his appointment as permanent receiver.

Statutes Involved

The text of the statutes and Executive Orders involved on this appeal are contained in the Appendix to the Government's Brief and, accordingly, have not been reproduced.

Statement

This proceeding is one by the Attorney General, as successor to the Alien Property Custodian, against Deems Taylor, as President of the American Society of Composers, Authors and Publishers (hereinafter referred to as ASCAP) and Henry M. Propper, as Temporary Receiver in New York of Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (hereinafter referred to as AKM). The complaint, so far as pertinent to this appeal, seeks an adjudication that the Custodian has right, title and interest superior to that of defendant Propper in certain moneys allegedly owed by ASCAP to AKM, as well as judgment against ASCAP for such moneys (I R. 7-11, 14-15).

Cross-motions were made by defendant Propper (I R. 70-71) and by the Custodian (I R. 92-93) for summary judgment as against each other. The District Court (Coxe, D. J.) granted the Custodian's motion, and a judgment was thereupon entered adjudging that defendant Propper had no right, title or interest in any property held by ASCAP belonging to AKM (I R. 152-153).

Defendant Propper appealed to the Court of Appeals for the Second Circuit (I R. 154-155). That Court dismissed the appeal for lack of finality, on the ground that no judgment had been entered against defendant ASCAP for the amount due. *Clark* v. *Taylor*, 163 Fed. 2d 940.

Thereafter, plaintiff and defendant ASCAP entered into a stipulation (II R. 4-6) to the effect that the royalties allocable by ASCAP to AKM for the period in suit aggregated $46,839.54, after payment of all federal, state and

local taxes thereon, and that a judgment for that sum might be entered, without prejudice to the right of ASCAP to file any claim under the Trading with the Enemy Act, or otherwise, to secure payment of any debts, claims or demands owing by AKM to ASCAP. A final judgment based upon that stipulation was then entered at a pre-trial hearing before District Judge Coxe (II R. 25-26).

Defendant Propper appealed from that judgment to the Court of Appeals for the Second Circuit (II R. 27-28). That Court affirmed the judgment (169 Fed. 2d 324). On January 3, 1949, this Court granted certiorari limited to questions 1 and 2 presented by the petition for the writ (II R. 48).

The Facts

Defendant ASCAP is an unincorporated association created under the laws of the State of New York and is engaged in the business of granting licenses and collecting royalties for the public performance of the musical works of its members and alloting and distributing such royalties among them (I R. 5, 118). AKM was, and presently is, an Austrian organization engaged in Austria in business activities similar to those engaged in by ASCAP in the United States (I R. 8, 118). On January 1, 1933, ASCAP and AKM entered into a written contract (I R. 16-28) under which each would have the exclusive right to license in the country in which it did business the public performance of the musical compositions in the repertoire of the other. It was further agreed that each party should account to the other on the basis of a formula set forth in the contract (I R. 8-9, 118).

It is alleged in the complaint that for the period from January 1, 1933, to December 31, 1938, a net sum of $62,809.85 became due and owing under this contract from ASCAP to AKM (I R. 9). In its answer, defendant ASCAP alleged that substantial sums had become due from AKM to ASCAP under the contract, no part of which had been paid, and that in truth and in fact the credit balance between the parties was in favor of ASCAP, rather than AKM (I R. 68-69).

Commencing in February, 1939, a series of actions had been brought in the Supreme Court of the State of New York for the County of New York by a small group of persons, all represented by the attorney representing the petitioner herein, seeking to acquire for themselves the funds allegedly held by ASCAP for the account of AKM (I R. 103-104). All of those actions proved abortive. Finally, on June 9, 1941, one Franz Sobotka filed a petition in the Supreme Court of the State of New York for the County of New York alleging that he was a creditor of AKM and that AKM was a foreign corporation which had been liquidated leaving assets within the State (I R. 31, 49). By that petition he sought the appointment of a receiver of such assets pursuant to Section 977(b) of the New York Civil Practice Act (I R. 9, 31, 118).

On June 12, 1941 an *ex parte* order was entered appointing defendant Propper as temporary receiver, upon filing a bond in the sum of $1,000, and directing him "to take, receive and reduce to his possession any and all assets, property, credits and choses in action and property, tangible and intangible, within the State of New York" be-

longing to AKM (I R. 49-51). Almost immediately thereafter, Sobotka made an application to remove Propper or, in the alternative, to vacate the order appointing him temporary receiver, because of his refusal to retain the attorney representing Sobotka (I R. 61-62). This dispute was compromised and on July 7, 1941 an order was entered providing for the retention by the receiver of counsel chosen by Sobotka, as well as attorneys of his own selection (I R. 61-63).

On July 9, 1941 (I R. 10, 79) defendant Propper, having qualified and filed his bond on July 7, 1941, caused to be served upon defendant ASCAP a written notice of his appointment as temporary receiver, together with a demand for the delivery to him of the assets and property of AKM, alleged to be held by ASCAP (I R. 52-55). Prior to the service of that demand, and on June 14, 1941, Executive Order 8389 (5 F. R. 1400) had been amended so as to include Austria and nationals of Austria among those whose property was subject to the "freezing" regulations (6 F. R. 2897). When ASCAP refused to comply with the demand, defendant Propper, as temporary receiver, commenced an action against ASCAP in the New York Supreme Court on July 29, 1941, seeking to recover the sums allegedly due from ASCAP to AKM (I R. 10, 33-34). ASCAP interposed an answer in that action asserting, among other things, that Executive Order 8389, as amended, prohibited the transfer to the temporary receiver of any assets or claims belonging to AKM (I R. 96-97, 100).

On September 29, 1941 a default judgment was entered in the receivership proceeding against AKM (I R. 56-60). Under that judgment defendant Propper was appointed

permanent receiver, but no attempt was made to substitute the permanent receiver for the temporary receiver in the action which had previously been instituted against ASCAP.

Shortly after issue was drawn in the State Court action, the war in Europe broke out. On April 11, 1942, defendant ASCAP sought an order staying Propper from the further prosecution of his action until three months after the termination of the state of war then existing between the United States and Germany (I R. 119). That application was granted by the New York Supreme Court by order dated May 16, 1942, which was affirmed by the Appellate Division, First Department, on February 6, 1943 (*Propper v. Taylor*, 265 App. Div. 1049).

While the aforementioned stay was in force and effect, and on September 4, 1943 the Alien Property Custodian, acting under the authority of Section 5(b) of the Trading with the Enemy Act and Executive Order 9095, issued Vesting Order 2097, purporting to seize all of the property of AKM in the United States, as well as the property of a number of other European performing rights societies (I R. 112-116). On September 11, 1943 the Custodian made written demand upon ASCAP for delivery to him of all royalties due AKM under the contract of January 1, 1933 (I R. 10, 67).

Defendant ASCAP, confronted with the conflicting claims of Propper and the Custodian, made an application pursuant to Sections 83 and 210 of the New York Civil Practice Act to substitute the Custodian as party plaintiff in the State Court action, in place and instead of defendant

Propper (I R. 121). Notice of that application was given to the Custodian, who appeared specially for the purpose of contesting the State Court's jurisdiction over him (I R. 139-142). The motion for substitution was denied at Special Term and, in lieu thereof, the Court directed that "unless the Custodian shall voluntarily procure himself to be made co-plaintiff in this action" within a specified period of time "he will be barred and foreclosed of any and all right, title and interest in the subject matter of this action". (*Propper* v. *Taylor*, 186 Misc. 72.)

An appeal was then taken from that order to the Appellate Division, First Department. On April 18, 1946, that Court reversed the ruling of the Special Term, on the ground that the State Court had no jurisdiction over the Custodian and could make no order affecting his title to the property of AKM (*Propper* v. *Taylor*, 270 App. Div. 890). A few days thereafter and on April 22, 1946, this action was instituted by the Custodian in the United States District Court for the Southern District of New York against both ASCAP and Propper, seeking a money judgment against defendant ASCAP and a declaration that defendant Propper as receiver had no interest in any such recovery (I R. 7-11, 14-15).

No proceedings have been taken in the State Court action since April, 1946, when the Federal Court action was instituted. In the meantime the Federal Court action has proceeded to the final judgment here under review.

Summary of Argument

Defendant ASCAP's sole interest in this appeal is to obtain a determination as to the priority of the conflicting claims asserted against it by defendant Propper and by the Attorney General, as successor to the Custodian. That determination necessarily involves a construction of the legal effect of Executive Order 8389, as amended on June 14, 1941, in the light of the provisions of Section 977 (b) of the New York Civil Practice Act.

Petitioner maintains that upon his appointment as temporary receiver, two days prior to the effective date of the regulation "freezing" the assets of Austrian nationals, he acquired title to the debt which is the subject of this action. He further contends, in any event, that the "freezing" regulations, even if applicable to the transaction, did not prevent the subsequent vesting of the debt in him upon his appointment as permanent receiver, but merely prohibited the payment thereof without a license.

The Attorney General asserts that, prior to June 14, 1941, petitioner had acquired no interest whatever in the property of AKM, but merely a right to reduce such property to possession. Based upon that premise, the Attorney General argues that after June 14, 1941 the "freezing" regulations operated to prevent the acquisition by petitioner of any interest in the debt, and that title thereto passed to the Custodian under his subsequent Vesting Order.

Throughout this litigation defendant ASCAP has concurred in the position asserted by the Government (R. 125). Accordingly, it adopts the contentions of the At-

torney General on this appeal. In this brief it urges only that the courts below properly exercised jurisdiction over this controversy and that, under New York law, petitioner did not acquire, prior to June 14, 1941, such an interest in the debt in suit as to be unaffected by the impact of the "freezing" regulations as amended on that date.

I.

Petitioner by his appointment as temporary receiver did not acquire such an interest in the debt in suit as to be unaffected by the impact of Executive Order 8389, as amended on June 14, 1941.

The petitioner attempts to avoid the implications of Executive Order 8389, as amended on June 14, 1941, by asserting that the order made on June 12, 1941, appointing him temporary receiver automatically vested him with title to the debt in suit. That claim conflicts with the well settled law of New York with respect to temporary receivers and finds no support in the provisions of Section 977(b) of the New York Civil Practice Act.

The New York courts have consistently differentiated between temporary and permanent receivers. *Decker* v. *Gardner*, 124 N. Y. 334 at 338. The distinction in the powers of the two types of receivers has been recognized and preserved by statute (Cf. Section 162 of the N. Y. General Corporation Law with Section 168). Under New York law, a temporary statutory receiver, like a temporary equity receiver, takes no title to the corporate assets, but acquires only a right of possession. See: *Sigua Iron Co.* v. *Brown*, 171 N. Y. 488 at 494 (and cases there cited).

Nealis v. *American Tube & Iron Co.*, 150 N. Y. 42, upon which petitioner relies, although employing loose language, actually holds nothing to the contrary. That case involved only the question of whether the temporary receiver had power to maintain an action to set aside a fraudulent transfer without making the insolvent corporation a party defendant. The very statute under which the action was brought expressly gave the temporary receiver such power. N. Y. Code of Civil Procedure, Section 1788 (now N. Y. General Corporation Law, Section 162).

There is nothing in Section 977-b) of the New York Civil Practice Act indicative of a legislative intent to depart from long established precedent. On the contrary, subdivision 4 of the statute provides that the temporary receiver appointed thereunder (like other temporary receivers) is to "take, receive and reduce to his possession" the assets of the foreign corporation and "hold the same until the further order of the court". Read in its chronological context, subdivision 19 which provides that "title to all assets * * * shall immediately vest in the receiver upon the making of the order appointing him", necessarily relates to the permanent receiver, whose appointment is provided for in subdivision 10. Since the temporary receiver is appointed *ex parte* and his appointment is mandatory, where the requisite facts are alleged, it is entirely unreasonable to suppose that the legislature intended to vest title to all the corporate assets in such a receiver.

Petitioner's claim to the contrary is founded upon the fallacious argument that the constructive service provided for by the statute would be without due process unless the prior appointment of the temporary receiver had, in and of

itself, vested the corporate assets in him. That argument overlooks the requirement of subdivision 5 that, as a prerequisite to service by publication, a demand must first be served upon a person holding property of the corporation or against whom it has a claim. Under subdivision 20, such a demand results in putting the receiver in possession of the property and, like the levy made under a warrant of attachment, furnishes the jurisdictional foundation for constructive service. Cf. *Dimmerling* v. *Andrews*, 236 N. Y. 43.

It is, therefore, submitted that the District Court and the Court of Appeals correctly disposed of the first issue presented by the writ of certiorari by holding that petitioner did not acquire title to the debt in suit solely by virtue of his appointment as temporary receiver. They were thus properly brought to the second issue presented by the writ, namely, a consideration of whether the "freezing" regulations, as amended on June 14, 1941, prevented such title from vesting in petitioner upon his subsequent appointment as permanent receiver. On that issue both Courts adopted the Government's position, and on this appeal defendant ASCAP, as it did below, while joining in his argument, will leave to the Attorney General the burden of sustaining that determination.

Petitioner's assertion that in construing Section 977(b) the lower courts disregarded this Court's admonition "against construing state statutes before they have been construed by the state courts themselves" (Pet. Br. p. 21) is wholly unwarranted. The federal courts obviously had jurisdiction over this controversy (*Markham* v. *Allen*, 326 U. S. 490), and the mere fact that a question of state law was incidently involved furnished no ground for a refusal

to exercise that jurisdiction. *Meredith* v. *Winter Haven*, 320 U. S. 228. This is particularly true in a case such as this, where no claim can be made that the decision below constitutes a departure from state law (*McGregor* v. *State Mutual Co.*, 316 U. S. 280) and where, as the Court of Appeals pointed out, "unusually important federal rights" are involved (II R. 46).

Prior to the institution of this action, defendant ASCAP was placed in serious jeopardy and threatened with double liability by reason of the conflicting claims being asserted against it by defendant Propper and the Custodian. Propper was pressing his claim in the New York State Courts and the Custodian had refused to become a party to that litigation. Moreover, the State courts had held that the Custodian could not be subjected, against his wishes, to their jurisdiction (270 App. Div. 890). Accordingly, the institution of this action in the United States District Court for the Southern District of New York brought all of the parties in interest into a single forum for the first time. That forum was the only one having jurisdiction over all the parties, and properly equipped to finally determine the controversy.

Under these circumstances the exercise of federal jurisdiction was essential to protect defendant ASCAP from the possible risk of double liability. Any disposition of this appeal should give due consideration to that defendant's position and safeguard it against being subjected to these conflicting claims in the future.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of AKM;

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR REHEARING

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On the Brief.

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Respondent.

PETITION FOR REHEARING

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner herein, HENRY M. PROPPER, as Receiver, etc., respectfully prays this Court to grant a rehearing of this cause, for the reasons hereinafter stated, and upon such rehearing, to reverse the judgment below.

We believe that the majority opinion overturns two basic doctrines long maintained in this Court. The opinion does not portend this result expressly. However, it follows inevitably from the plain implications of the opinion. It is for this reason that we earnestly ask this Court to re-appraise its decision.

I.

The decision here changes the constitutional basis of *in rem* jurisdiction; in effect, it overrules *Pennoyer* v. *Neff*.

Since 1878 (*Pennoyer* v. *Neff*, 95 U. S. 714), this Court has held, consistently, that a state may adjudicate against a non-resident—not personally served in the state—to the extent that he has property in the state. This is constitutionally possible (under the 14th Amend.) if the property proceeded against is "brought under the control of the Court by seizure or some equivalent act" at the commencement of the action. *Pennoyer* v. *Neff*, 95 U. S. 714, 727.

The majority opinion in the instant case (p. 15) professes to follow this rule here. The Court assumes that, under New York law, AKM's property was "brought under the control of the Court" by the mere appointment of the temporary receiver. Therefore, it concludes that the requisite of *in rem* jurisdiction is satisfied here. If the assumption is valid, the decision does not diverge from *Pennoyer* v. *Neff*, *supra*. On the other hand, if the mere appointment of Petitioner as temporary receiver did not—under New York law—bring AKM's property under the control of the Court, this Court has here sanctioned a departure from *Pennoyer* v. *Neff*.

Under §977-b of the New York Civil Practice Act the property of the defunct foreign corporation is dealt with in two phases. In the first, a method is supplied for taking jurisdiction of *all* of the defunct foreign corporation's local assets. This is done by vesting the receiver—while temporary—with title to all such assets. In his temporary capacity, the receiver is the equivalent of the sheriff. His

appointment is meant to effect an attachment of all the assets. The second phase is that of distributing all of the assets after judgment. This is done by the receiver in his permanent capacity.

The entry of the order appointing Petitioner temporary receiver was comparable to the issuance of a warrant to the sheriff to attach the defendant's property. The warrant of attachment—even if placed with the sheriff—brings nothing under the control of the Court. Only when the warrant of attachment is executed by a levy has there been the seizure (or equivalent) required by *Pennoyer v. Neff*. *Robinson* v. *Columbia Spinning Co.*, 23 N. Y. App. Div. 499, 502; *Rodgers* v. *Bonner*, 45 N. Y. 379; *Cooper* v. *Reynolds*, 10 Wall. 308, 319; *New York Civil Practice Act* §916.

The mere appointment of Petitioner as temporary receiver under §977-b with the direction to him to take and hold all the assets of AKM was the equivalent—and nothing more—of the issuance of the warrant of attachment to the sheriff. The sheriff, equally with the temporary §977-b receiver, acts as the officer of the Court. *Stojowski* v. *Banque De France*, 294 N. Y. 135, 145. The warrant of attachment, equally with the order appointing the temporary receiver, is a direction and authorization to take the defendant's property for purposes of *in rem* jurisdiction.

If the direction to the sheriff to take the defendant's property, embodied in the warrant, does not, alone, effect its seizure (or the equivalent), then the mere appointment of the temporary §977-b receiver does not—without more—effect a seizure. In neither case is the defendant's property brought under the control of the Court. In neither is this essential jurisdictional requisite—indispensable under *Pennoyer* v. *Neff*—present. In both cases, some-

thing more is required. In case of attachment, the seizure is perfected when, and only when, the warrant is levied. *N. Y. Civil Practice Act* §916. In the case of §977-b, the property of the defunct foreign corporation is brought under the control of the Court only because the appointment of the temporary §977-b receiver is complemented by subd. 19 of §977-b which vests all of such property in the temporary receiver "upon the making of the order appointing him."

It is true, as the majority opinion states, that a seizure of title is not essential under *Pennoyer* v. *Neff*. The seizure may be by attachment, injunction, garnishment, etc. But it is equally true—under New York law—that the mere appointment of a receiver is no seizure at all unless accompanied by attachment, injunction, garnishment, etc. Without some process against the foreign corporation's property, whether by attachment, garnishment, or, as here, by vesting the temporary receiver with title, the mere appointment of a receiver in an *in rem* proceeding brings nothing under the control of the Court. The New York State Court of Appeals has so held. *Matthews* v. *Matthews*, 247 N. Y. 32, 34, 35; *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43.

The New York Legislature might have provided, in §977-b, for less than a seizure of title to accompany the appointment of the receiver in order to bring the property under the control of the Court. It chose not to do so. Instead, it vested in the temporary receiver title to *all* of the defunct corporation's assets so that the seizure would be coextensive with the object of the action, namely, liquidation and distribution of *all* of such assets. In this, the N. Y. Legislature acted well within its power. The choice of whether the seizure shall be one of title or something less rests with the State. *Sanders* v. *Armour Fertilizer*,

Works, 292 U. S. 190, 208 (Cardozo, *J.*, dissenting); *Corn Exchange Bank v. Coler*, 280 U. S. 218; *Security Savings Bank v. California*, 263 U. S. 282.

Even if §977-b had specified attachment or garnishment —instead of the temporary receiver—as the seizure device, the seizure would be one of *title*. In New York, attachment and garnishment would both have entailed a seizure of AKM's *title* to the ASCAP debt.

In one state the seizure, whether by attachment, injunction, garnishment, receiver, etc., may merely involve a right to possession. In another, it may effect a change of title. This Court is bound, constitutionally, to give the state statute the force and effect which it has in the state. U. S. Constitution, Article 4, §1; 28 U. S. Code, §687; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166.

Under the statutes of New York, an *in rem* seizure for jurisdictional purposes is a seizure of title. This is true, whether, on the one hand, the seizure is by attachment or garnishment, or, on the other, by the appointment of a receiver, as here. The New York attachment statutes provide that the levy of the warrant of attachment against a debt effects a "seizure of all the rights of the defendant in or to the said debt." *N. Y. Civil Practice Act*, §916, subd. 3 and 4. This is not merely a seizure of the right to possession; it is a seizure of all the defendant's rights. It is unquestionably a seizure of title. §977-b, subd. 19, in directing that title to all of the local assets vest in the temporary receiver upon the making of the order of his appointment, merely conformed the seizure features of that statute with those already existing in case of attachment or garnishment. §977-b, being an attachment statute, should have been construed in analogy with the New York attachment statutes not with the *dicta* of old chancery decisions which dealt—not with seizure for purposes of

in rem jurisdiction, but—only with the powers of temporary receivers under the traditional chancery practice. (Our main brief, p. 20.)

As we read the opinion, this Court accepts the view that the temporary §977-b receiver was the device—as in attachment or garnishment—for acquiring *in rem* jurisdiction. This being so, there is no basis for holding that the N. Y. Legislature intended to accomplish less by the attachment device of §977-b than by attachment or garnishment under other New York laws. The New York courts hold to the contrary. Since, in attachment in New York, the sheriff is vested with title, the same must be true of the temporary §977-b receiver. This follows not only because of the clear dictate of subd. 19 of §977-b, but also under the New York rule of statutory construction. *Matthews* v. *Matthews*, 240 N. Y. 28, 34.

If, as this Court holds, the appointment of the temporary §977-b receiver does not vest him with title but only a right to possession, we do not see how §977-b can square with *Pennoyer* v. *Neff* unless the temporary §977-b receiver actually succeeds in reducing all of AKM's assets to his possession prior to the judgment. Subd. 10 and 11 of §977-b make it mandatory that the final judgment rendered shall bind *all* of the property of the foreign corporation. Such a judgment would be utterly void, as to any assets not taken into possession by the temporary receiver prior to the judgment. It would be impossible, under the 14th Amendment, for the permanent receiver to distribute all of AKM's assets, if the temporary receiver took less. Read, as construed by this Court, §977-b would make it mandatory upon the Court to enter a judgment which, under *Pennoyer* v. *Neff*, would be constitutionally void to the extent of AKM's property not actually taken into possession by the temporary receiver. *Freeman* v. *Alder-*

son, 119 U. S. 185; *Heilbrunn, etc., v. Kellogg*, 253 App. Div. 753, *app. dism.* 279 N. Y. 273.

Since, under the law of New York, the mere appointment of the temporary receiver was not—without attachment or the equivalent—a seizure of AKM's property, the necessary effect of the holding here is that *in rem* jurisdiction may be validly acquired without a seizure or its equivalent. This is precisely contrary to the holding in *Pennoyer* v. *Neff*. The Bar can construe the opinion in no other way.

The opinion here injects a new element of uncertainty into §977-b. New York litigants must choose, at their peril, whether to ascribe to the appointment of the receiver the effect given to such appointment by this Court or that—wholly different—given to it by the New York Courts. It is true that, under the decisions of this Court, the holdings of the New York courts on issues of state law are controlling. *Hicklin* v. *Coney*, 290 U. S. 169, 172. However, no court or lawyer would have the temerity to disregard a contrary holding by this Court.

The effect of the decision here, in its impact upon existing law, is four-fold:

1. This Court has pre-empted the authority of the New York courts to determine the quality of the title taken by the temporary §977-b receiver;

2. This Court has found that the mere appointment of the temporary §977-b receiver was the equivalent of an attachment, contrary to the holdings of the highest court of the State of New York;

3. This Court has given to the attachment device of §977-b an effect precisely contrary to that of other attachment statutes of the State of New York; and

4. This Court has, in effect, overruled *Pennoyer* v. *Neff* by holding that *in rem* jurisdiction can be validly acquired under §977-b by a process which the Courts of the State of New York have held to be ineffective to achieve a seizure or its equivalent.

Since the decision here has such impact, not only on the law of New York, but also upon federal law (insofar as the latter turns on state law), we earnestly urge that the point of state law be first referred to the New York Courts for authoritative construction. Only thus can the federal rule here involved emerge freed of the doubt and conflict now existing. Petitioner will furnish such guaranties as this Court may require that, if the cause is referred to the State Court for determination of the point of state law, he will raise no other issues in the State Court.

II.

The decision here overrules the traditional rule of comity which forbids State and Federal courts each from taking jurisdiction of a *res* first brought under the control of the other.

For almost a hundred years it has been the settled rule of comity, formulated by this Court, that, "when a State Court and a Court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the

jurisdiction involved is exhausted." (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231; *Freeman* v. *Howe*, 24 How. 450.) The rule is one of right. It arises from the necessity, in a Federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. This Court has accepted a "long recognized duty * * * to give effect to such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States". (*U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.)

The practical effect of the decision here is to deprive this rule of all of its vitality.

The Court holds here that the State Court effectively brought the ASCAP debt under its control by appointment of the temporary receiver. Under the rule of comity, the ASCAP debt was thereby "withdrawn from the jurisdiction of all other courts." The State Court alone was vested "with the power to hear and determine all controversies relating" to the ASCAP debt. (*Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 88.)

Notwithstanding this, the decision here permits the District Court to direct ASCAP, which held the debt subject to order of the State Court, to pay it to the Custodian. The acknowledged prior control of the State Court is no control at all if the District Court may, at its pleasure, channel the *res* directly to its own designee. The rule of comity is founded on the reciprocal duty of state and federal courts—each to respect the prior jurisdiction of the other over a *res*. We cannot see how it can be said that the District Court accorded this respect to the State Court if it was free to order ASCAP to pay the debt to the Custodian, leaving the State Court's proceed-

ings and judgment wholly ineffectual. Such a holding can only be premised on the notion that Federal Courts are superior—not merely equal—to State Courts. Cf. *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 89, and *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, in which the rule of comity was enforced against the United States.

It is true, of course, that the District Court could have determined, as between claimants on distribution in the receivership proceeding who should take when the State Court was ready to direct distribution. Such an adjudication, *in personam*, of rights between claimants was open to the District Court only because it did not challenge the State Court's jurisdiction over the *res*. Such an *in personam* determination would be "subordinate to every right asserted and decreed" in the State Court and "effective only insofar as it establishes rights derived from them." (*U. S.* v. *Klein*, 303 U. S. 276, 282.) The State Court would continue capable of proceeding to a judgment binding the *res*, notwithstanding the *in personam* decree of the District Court. (*U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 477.)

The State Court had asserted and decreed the right—established by §977-b—to liquidate the claim against ASCAP, to apply the proceeds to the expenses of administration and to distribute the balance to those ultimately entitled as claimants. The *res* seized by the State Court was in law appropriated to these ends. The adjudication of the District Court, by channeling the debt directly from ASCAP to the Custodian, contravened the declared right of the State Court to achieve these ends. To permit this is not merely to sanction the "determination[s] of rights to participate in *res* in the hands of state courts," as this

Court here holds.[1] It is to exclude the State Court from any authority over the *res*. The District Court judgment in practical effect terminated the State receivership proceedings.

The difficulty with the decision here is that it proceeds upon the assumption that the suit brought by the Custodian in the District Court was *in personam*. The fact is that the Custodian had made an *in rem* seizure of AKM's interest in the ASCAP debt under the Trading with the Enemy Act, and brought the action in the District Court to enforce that seizure. (Our reply brief, p. 13.) ASCAP was joined because it held the seized property. As to it, the proceeding was *in personam*. As to AKM, the proceeding in the District Court—as well as that in the State Court—was *in rem*. *Security Savings Bank* v. *California*, 263 U. S. 282, 287. Obviously, the receivership action and the proceeding in the District Court—both involving proceedings *in rem*—necessarily entailed a conflict. As stated by this Court in *U. S.* v. *Bank of New York & Trust Co.*, 463, 477:

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1 This case in no way involved the "determination of rights to participate in res" as this Court assumes. As we understand it, the phrase "determination of rights" as used heretofore has always meant only an adjudication *in personam* between claimants. The judgment in such case merely furnishes the basis for the claim (on distribution) later filed in the Court which has possession of the *res*. Here Petitioner and the Custodian were not rival "claimants." Rather, each asserted the right to the ASCAP debt for the purpose of administration among claimants. The judgment of the District Court in directing payment of the ASCAP debt to the Custodian, left nothing to be done in the State Court. The Custodian can and will take the gross amount of the ASCAP debt without the necessity for making claim upon the State Court and without deduction of administration expenses and taxes which were a charge against the debt while in State Court custody. The decision here permits precisely that which *Markham* v. *Allen*, 326 U. S. 490, 495, noted as being in conflict with the rule of comity.

> "If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other."

Once the conflict is resolved by directing, as here, that ASCAP pay the debt to the Custodian, the State Court, though its jurisdiction first attached, no longer has "possession or control of the res" which is indispensable to enable it "to proceed with the cause and to grant the relief sought."

If, as here, a lower Federal Court may strip a State Court of a *res*, admittedly first acquired by the latter, we can perceive of no case in which the rule of comity between State and Federal Courts can have practical application. The rule of comity exists *in vacuo*—there is no area in which it may operate. We believe, in all sincerity, that the holding here—despite the language of the opinion—has doomed the rule of comity. The Bar cannot construe the result here in any other way.

III.

The decision misapprehends the effect of the judgment appointing petitioner Permanent Receiver. This event did not entail any transfer of credit between banking institutions.

This Court holds that ASCAP and Petitioner are banking institutions within the meaning of Exec. Order 8389 and that the judgment appointing Petitioner permanent receiver effected a transfer of credits so that prior to the judgment "ASCAP held a credit for AKM" and after

the judgment ASCAP held the credit "for the receiver". Therefore, it is held, the judgment of the State Court contravened §1A of the Executive Order. This argument was urged for the first time in this Court by the Custodian.

We believe that the term "banking institution" was never intended to apply to such as Petitioner or ASCAP.[2] However, even if such intention be assumed, the State Court's judgment did not involve a transfer of credit between banking institutions.

Petitioner, as receiver, became entitled to the ASCAP debt, by operation of law (§977-b, subd. 19). The judgment of the State Court which effected this result involved no act on the part of AKM or ASCAP. The judgment effected no change in ASCAP's books. It did not require ASCAP to debit AKM or credit the receiver; and ASCAP did not do so. In fact, ASCAP denied that it owed anything to either (1. R 68-9). How, then, can it be said that entry of the judgment of the State Court entailed a forbidden transfer of credits? Before any transfer of credit could occur, the receiver would have to reduce to judgment his suit against ASCAP. Then—and only then—would ASCAP be called upon to debit AKM's account and to credit that of Petitioner. This point was not reached in

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2 In its administration of the freezing controls, the Treasury Department consistently used the term "banking institution" only in its ordinary sense. Thus, it was applied to organizations having safe deposit boxes (Gen. Ruling 16, 9 F. R. 14669); making service charges for usual banking functions (Gen. License No. 2, 9 F. R. 2083); selling securities on stock exchanges for customers (Gen. License No. 4, 7 F. R. 7518); honoring checks, drafts, orders, etc. (Gen. License No. 7, 10 F. R. 6057; Gen. License No. 37, 7 F. R. 9862); collecting income on, and redeeming, securities held for customers (Gen. License No. 27, 7 F. R. 468; Gen. License No. 31, 6 F. R. 3349); issuing letters of credit, etc. (Gen. License No. 53, 9 F. R. 2084). See also Gen. License No. 60, 6 F. R. 3724; Gen. License No. 61, 6 F. R. 5804.

the proceedings and, accordingly, it cannot be said that a prohibited transfer of credits is involved.

However, even if the judgment appointing the receiver entailed a transfer of credit between banking institutions, it was such a transfer as had been expressly authorized by the Secretary of the Treasury. The receivership proceedings against AKM were in the nature of an attachment. *Matthews* v. *Matthews*, 247 N. Y. 32, 33. From the very inception of the freezing controls, attachment of frozen funds was authorized by the Treasury Department. It is not, and cannot be, denied that the Treasury ruled consistently that attachment suits were permitted by the freezing controls (our main brief pp. 50-3 and footnote 9; our reply brief p. 21, footnote 20). Under Sec. 1 of Exec. Order 8389, this ruling obviated the need for a license. The Treasury could authorize transactions in frozen funds "by means of regulations, rulings, instructions" as well as by "licenses". Since, as an action in the nature of attachment, the §977-b proceeding was authorized by the Treasury, it is immaterial whether the §977-b judgment entailed a transfer of credits. It was a permitted transfer—subject only to the restriction that payment of the credit was subject to license.

We believe that the decision is premised upon a transfer of credits when, in fact, none is involved. We believe, further, that there is no need to inquire into this question, since the §977-b proceeding was an attachment proceeding fully authorized by the Secretary of Treasury under the authority delegated to him by the President in Exec. Order 8389. We believe that the Court has misconceived the effect of the Executive Order upon the §977-b proceeding.

CONCLUSION

We are not unmindful of the importance of establishing the authority of the Executive in time of war. However, we are dealing here with a peacetime transaction solely. At the time of Petitioner's appointments—both temporary and permanent—there was no Alien Property Custodian and no effective Trading with the Enemy Act under which he could function, had that office then existed. What proper purpose of the Custodian can possibly be served by giving to the Custodian, as here, the authority to reach back into peacetime events and to destroy the peacetime State Court receivership of long standing? We believe that American creditors of AKM deserve a better plight than that in which the decision leaves them. The claims which they filed with the Receiver, cannot be satisfied in consequence of the decision here. Time limitations prevent them from claiming from the Custodian. Surely, such an unfortunate result can await a test of the state law by the State Courts.

Other cases, now *en route* to this Court will afford the Custodian the opportunity for the test which is possible here only by repudiating basic principles of both state and federal law which have been long established.

We earnestly urge this Honorable Court to direct a re-hearing of this cause, and, upon such re-hearing, to grant such relief as may be just and proper.

Respectfully submitted,

A. Walter Socolow,
Counsel for Petitioner.

Joseph M. Cohen,
On the Brief.

Certificate Pursuant to Rule 33

I, A. Walter Socolow, Counsel for the within petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay.

A. Walter Socolow,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A. K. M.,

Petitioner,

vs.

TOM C. CLARK, Attorney General, as successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF PETITIONER, HENRY M. PROPPER, ETC., FOR LEAVE TO FILE ANNEXED SECOND PETITION FOR RE-HEARING

A. WALTER SOCOLOW
Attorney for Petitioner

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Now comes the petitioner, Henry M. Propper, etc., by his attorney, A. Walter Socolow, and moves the Court for leave to file the annexed second petition for re-hearing and to recall the mandate heretofore issued herein.

Under §452 of Title 28 of the United States Code, this Court may entertain the annexed second petition for re-hearing.

Respectfully submitted,

A. WALTER SOCOLOW
Attorney for Petitioner
580 Fifth Avenue
New York, N. Y.

To paraphrase the *Zittman* case, the Custodian, by his right, title and interest order, acknowledged here that (341 U. S. 463),

> "if the interests acquired by the *state receivership proceeding* are valid as against *A K M* he [the Custodian] is not under the Vesting Orders involved, as he has chosen to phrase them, entitled to the *funds in dispute*, but he takes the position that no valid rights against *A K M* were acquired by the *receivership proceeding* because prohibited by the freezing program. He has, in short, put himself in the shoes of *A K M*." (Italicized matter substituted for portions of text of *Zittman* opinion).

The receivership proceeding against A K M—like the unlicensed attachment in *Zittman*—was good as against A K M. Of course, as in *Zittman*, petitioner could not possess himself of A K M's property until licensed to do so under Exec. Order 8389. However, the Custodian could not here—any more than in *Zittman*—defeat petitioner's rights, as receiver, by vesting the "right, title and interest" of A K M in the property comprehended by the receivership. Applicable here is this Court's holding in *Zittman* that rights acquired against blocked funds by litigation under New York law "cannot be cancelled or annulled under a Vesting Order by which the Custodian takes over only the right, title and interest of" the blocked national (341 U. S. 464).

This Court mistakenly decided this cause as though a *res* vesting order were involved when, in fact, only a *right, title and interest* order had issued. *Zittman*, No. 298, 341 U. S. 446,—not *Zittman*, No. 299, 341 U. S. 471—states the result applicable here.

On the facts, *as they were assumed to be*, the holding here squares with the *Lyon* and *Zittman* cases. On the facts *as they actually were*, the holding here conflicts with those cases. This anomaly has led to much misunderstanding of this cause. *In re DeGheests Estate*, 360 Mo. 1002, 1006, 232 S. W. 2d 378, 380; *Todeva* v. *Oliver Iron Mining Co.*, 45 N. W. 2d 782, 789; *Bernstein* v. *N. V. Nederlandsche, etc.*, 173 F. 2d 71, 78. On a re-hearing this cause can be squared with the *Lyon* and *Zittman* holdings.

II

Petitioner was appointed temporary receiver of A K M prior to June 14, 1941, the date on which the controls were extended to Austrian nationals, of which A K M was one. It was conceded that, if, as temporary receiver, petitioner took title to A K M's property, he was entitled to prevail here against the Custodian. He did not prevail because this Court found that, under New York law, petitioner as temporary receiver took only the right to possession—not title. 337 U. S. 472, 486-9.

Zittman v. *McGrath, supra*, has since held precisely to the contrary. There this Court, speaking of the status of a temporary receiver appointed under the same statute as was petitioner, said (341 U. S. 460):

> "* * * Upon application by a creditor of such a corporation, the Court appoints a temporary receiver. *Title to all such assets vests in him upon appointment.*" (Emphasis supplied.)

A re-hearing should be had so that it may be finally determined whether, as temporary receiver, petitioner took title to the A S C A P debt, as held in *Zittman* v. *McGrath*,

or whether the contrary was the case as held in this cause. If, as temporary receiver, petitioner took title, the freezing controls were not in issue here and this cause should have been reversed.

CONCLUSION

So long as the holding here stands, there will be confusion and uncertainty as to where the rule of this cause ends and the rule of *Lyon* and *Zittman* begins. The confusion should be eliminated on a re-hearing of this cause.

Respectfully submitted,

A. Walter Socolow
Counsel for Petitioner

Certificate Pursuant to Rule 33

I, A. Walter Socolow, counsel for the within petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay.

A. Walter Socolow